92-280

No.

Supreme Court, U.S.
FILED
AUG 12 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

v.

OHIO POWER COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN G. ROBERTS, JR.
Acting Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM S. SCHERMAN
General Counsel

JEROME M. FEIT
Solicitor

JOSEPH S. DAVIES
Deputy Solicitor

TIMM L. ABENDROTH
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTIONS PRESENTED

When this case was previously before this Court, the Court unanimously reversed the D.C. Circuit's ruling that the orders of the Securities and Exchange Commission (SEC) under the Public Utility Holding Company Act (PUHCA) ousted the Federal Energy Regulatory Commission (FERC) of jurisdiction to consider the reasonableness of including the cost of respondent's coal purchases in its rates, and remanded the case to the D.C. Circuit to determine, *inter alia*, whether the FERC-prescribed rate was just and reasonable. *Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415, 422 (1990). Instead of doing so, the D.C. Circuit on remand again ruled that PUHCA ousted FERC of jurisdiction. The questions presented are:

1. Whether Section 13(b) of PUHCA, 15 U.S.C. 79m(b), which provides that sales of goods or services among affiliates of holding companies must be conducted "at cost," ousts FERC of its jurisdiction under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, to determine whether it is just and reasonable for a utility to include the entire cost of such goods or services in its wholesale rates.

2. Whether FERC reasonably construed its fuel adjustment clause regulation, 18 C.F.R. 35.14(a)(7), as establishing a rebuttable, rather than a conclusive, presumption that the price a utility subject to another regulatory body's jurisdiction pays its affiliate for coal constitutes a just and reasonable price.

PARTIES TO THE PROCEEDING

In addition to the Federal Energy Regulatory Commission and Ohio Power Company, the following were parties in the court below: the municipalities of Arcadia, Bloomdale, Bryan, Carey, Cygnet, Deshler, Greenwich, Ohio City, Plymouth, Republic, Shiloh, St. Clairsville, Sycamore, Wapakoneta, and Wharton, Ohio, LCP Chemicals, Inc., Mobay Corp., Olin Corp., and PPG Industries, Inc.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes and regulations involved	2
Statement	2
Reasons for granting the petition	14
Conclusion	27
Appendix A	1a
Appendix B	15a
Appendix C	17a
Appendix D	44a
Appendix E	46a
Appendix F	82a
Appendix G	88a

TABLE OF AUTHORITIES

Cases:

Arcadia, Ohio v. *Ohio Power Co.*, 111 S. Ct. 415 (1990)	10, 11, 15, 19, 21
Arkansas v. *Oklahoma*, 112 S. Ct. 1046 (1992)	24
Associated Gas Distribs. v. *FERC*, 706 F.2d 344 (D.C. Cir. 1983)	24
Board of Water, Light & Sinking Fund Comm'rs v. *FERC*, 931 F.2d 94 (D.C. Cir. 1991)	24
Bowers v. *United States*, 226 F.2d 424 (5th Cir. 1955)	23
Brimm v. *Cache Valley Banking Co.*, 269 P.2d 859 (Utah 1954)	23
Carolina Power & Light Co., 17 F.E.R.C. ¶ 61,118 (1981)	25
City of Lafayette v. *SEC*, 454 F.2d 941 (D.C. Cir. 1971), aff'd *sub nom. Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 (1973)	17
Connecticut National Bank v. *Germain*, 112 S. Ct. 1146 (1992)	16

Cases—Continued: Page

Delmarva Power & Light Co., 24 F.E.R.C. ¶ 61,199 (1983) 25
Electric Cooperatives of Kansas, 14 F.E.R.C. ¶ 61,176 (1981) 24-25
FPC v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949) 16
FTC v. *Ticor Ins. Co.*, 112 S. Ct. 2169 (1992) 24
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 23
McDowell County Consumers Council, Inc. v. *American Electric Power Co.*, 54 F.P.C. 361 (1975) 25
Mississippi Power & Light Co. v. *Mississippi*, 487 U.S. 354 (1988) 9
Mobil Oil Exploration & Producing Southeast Inc. v. *United Distribution Cos.*, 111 S. Ct. 615 (1991) 19
Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987) 23-24
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986) 9
Ohio Power Co.:
SEC HCAR No. 17383 (Dec. 2, 1971) 4
SEC HCAR No. 20515, 14 SEC Dkt. 928 (Apr. 24, 1978) 5
Public Serv. Co. of N.H., 6 F.E.R.C. ¶ 61,299 (1979) 24
Public Serv. Co. of N.M., 17 F.E.R.C. ¶ 61,123 (1981) 3
Public Serv. Co. of N.M. v. *FERC*, 832 F.2d 1201 (10th Cir. 1987) 3
Public Util. Comm'n v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) 18
Rosenberg v. *United States*, 346 U.S. 273 (1953) .. 16
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) .. 16
Southern Ohio Coal Co., SEC HCAR No. 21008, 17 SEC Dkt. 310 (Apr. 17, 1979) 5
Udall v. *Tallman*, 380 U.S. 1 (1965) 23

Constitution, statutes and regulations: Page

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) ... 26
Federal Power Act, Tit. II, 16 U.S.C. 791a-828c ... 2
§ 205, 16 U.S.C. 824d ... 3, 13, 22, 24
§ 205(d), 16 U.S.C. 824d(d) ... 18
§ 205(e), 16 U.S.C. 824d(e) ... 18
§ 206, 16 U.S.C. 824e ... 13, 22, 24
§ 206(a), 16 U.S.C. 824e(a) ... 18
§ 313(b), 16 U.S.C. 825*l*(b) ... 23
§ 318(q), 16 U.S.C. 825q ... 5, 6, 7, 9, 10, 15, 21, 88a
Public Utility Holding Company Act, Tit. I, 15 U.S.C. 79a to 79z-6 ... 2
§ 1(b)(2), 15 U.S.C. 79a(b)(2) ... 17
§ 1(b)(3), 15 U.S.C. 79a(b)(3) ... 17
§ 6, 15 U.S.C. 79f ... 4
§ 9, 15 U.S.C. 79i ... 4
§ 10, 15 U.S.C. 79j ... 4
§ 13(b), 15 U.S.C. 79m(b) ... 4, 13, 25, 26, 88a
§ 21, 15 U.S.C. 79u ... 18
Public Utility Act of 1935, ch. 687, 49 Stat. 803 ... 2
18 C.F.R. 35.14 ... 24
18 C.F.R. 35.14(a)(7) ... 9, 11, 12, 22-23, 24, 25

Miscellaneous:

44 Fed. Reg. 28,684 (1979) ... 25

In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

v.

OHIO POWER COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the Federal Energy Regulatory Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 954 F.2d 779. The opinion of this Court remanding this case to the court of appeals is reported at 111 S. Ct. 415. The earlier opinion of the court of appeals (App., *infra*, 17a-43a) is reported at 880 F.2d 1400. The decision of the Federal Regulatory Commission (FERC) (App., *infra*, 46a-81a) is reported at 39 F.E.R.C. ¶ 61,098. The decision of FERC denying rehearing (App., *infra*, 82a-87a) is reported at 43 F.E.R.C. ¶ 61,046.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1992. A petition for rehearing was denied on April 14, 1992. App., *infra*, 15a. By order of July 8, 1992, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including August 12, 1992. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced at App., *infra*, 88a-90a.

STATEMENT

This case involves the respective responsibilities of the Federal Energy Regulatory Commission (FERC) and the Securities and Exchange Commission (SEC) under the Public Utility Act of 1935, ch. 687, 49 Stat. 803. Title I of that Act, the Public Utility Holding Company Act (PUHCA), 15 U.S.C. 79a to 79z-6, authorizes the SEC to regulate transfers of property between public utility holding company affiliates. Title II of the Act, the Federal Power Act (FPA), 16 U.S.C. 791a-828c, authorizes FERC to regulate the rates that public utilities, including utilities affiliated with holding companies, charge their wholesale customers. This case raises the question whether the court of appeals, on remand from this Court, construed those statutes correctly and in a manner consistent with this Court's earlier ruling in this case.

1. In 1982, Ohio Power Company (Ohio Power), a utility operating subsidiary of American Electric Power Company, Inc., made a rate increase filing

pursuant to Section 205 of the FPA, 16 U.S.C. 824d. American Electric Power is a registered public utility holding company under PUHCA. In the proceedings that resulted from the filing, FERC staff and 15 small Ohio municipalities that purchase power from Ohio Power challenged the filing on the ground that the rates were premised on recovery of the full costs of coal that Ohio Power had purchased from its subsidiary, Southern Ohio Coal Company (SOCCO). FERC staff and the municipalities claimed that those costs far exceeded the market price of coal. Under FERC's "comparable market test," a utility purchasing goods from an affiliated firm can pass on the market price—not the cost—of those goods to its customers.[1] Accordingly, FERC staff and the municipalities argued that Ohio Power ought to be permitted to include only the market price—not the cost—of its "captive" coal in its rate base.

Ohio Power contended that, because its transactions with SOCCO had been approved by the SEC pursuant to PUHCA, FERC had to permit it to pass on the full costs of the coal in its rates. Under PUHCA, it is unlawful for a holding company or its subsidiary to issue or sell a security or to alter the

---

[1] The FERC order establishing the comparable market price test for the sale of "captive" coal was issued in 1981. Under that test, FERC ruled that "the interests of the consumers will best be protected by permitting utilities that purchase coal from affiliates to recover no more from their ratepayers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier." *Public Serv. Co. of N.M.*, 17 F.E.R.C. ¶ 61,123, at p. 61,246 (1981). The test was upheld by the Tenth Circuit in *Public Serv. Co. of N.M.* v. *FERC*, 832 F.2d 1201 (1987).

rights of those who hold securities without SEC approval, see PUHCA § 6, 15 U.S.C. 79f, or to acquire any securities without SEC approval, see PUHCA §§ 9, 10, 15 U.S.C. 79i, 79j. Most important for present purposes, under Section 13(b) of PUHCA, 15 U.S.C. 79m(b), it is also unlawful for a holding company subsidiary "to enter into or take any step in the performance of" any sales or service contract with an associated firm "except in accordance with such terms and conditions and subject to such limitations and prohibitions" as the SEC shall prescribe. Section 13(b) also provides that the SEC's "terms and conditions" and "limitations and prohibitions" shall be "as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies *at cost*, fairly and equitably allocated among such companies" (emphasis added).[2]

To comply with the above provisions of PUHCA, Ohio Power applied for and received SEC approval when Ohio Power proposed to establish and capitalize SOCCO as a wholly owned subsidiary in 1971 "[i]n order to assure a reliable supply of coal for [its] generating facilities." *Ohio Power Co.*, SEC Holding Company Act Release (HCAR) No. 17383 (Dec. 2, 1971). Ohio Power similarly applied for and received

---

[2] Section 13(b) does "not apply to such transactions as the [SEC] by rules and regulations or order may conditionally or unconditionally exempt as being necessary or appropriate in the public interest or for the protection of investors or consumers," if such transactions "involve special or unusual circumstances or are not in the ordinary course of business" or meet another statutory condition. 15 U.S.C. 79m(b). The complete text of Section 13(b) is set out in the Appendix, *infra*, 88a.

SEC approval on three additional occasions in 1978, 1979, and 1980, when Ohio Power transferred its coal producing assets to SOCCO and undertook further financing of SOCCO. On the first occasion, the SEC's order approving the transaction stated that SOCCO's charges for coal would be "based on" actual costs. *Ibid.* In 1978 and 1980, the SEC orders provided that the price of coal "will not exceed the cost thereof to [SOCCO]," *Ohio Power Co.*, HCAR No. 20515, 14 SEC Dkt. 928 (Apr. 24, 1978); *Southern Ohio Coal Co.*, HCAR No. 21008, 17 SEC Dkt. 310, 312 (Apr. 17, 1979), and in 1979, the SEC's order referred to that phrase in its 1978 order. None of the orders required Ohio Power to purchase any particular amount of coal from SOCCO, though the orders certainly authorized it to purchase such coal.

In contending that FERC had to permit it to pass through to its ratepayers all of its payments to SOCCO for coal, regardless of the relation of those costs to the market price of coal, Ohio Power relied on Section 318 of the Federal Power Act, 16 U.S.C. 825q.[3] Section 318, entitled "Conflict of jurisdiction," provides in relevant part that if, with respect to a number of types of transactions, "any person is subject both to a requirement of [PUHCA] * * * and to a requirement of [the FPA], the requirement of [PUHCA] shall apply to such person, and such person shall not be subject to the requirement of [the FPA] with respect to the same subject matter." Ohio Power contended that, if FERC were to deny it full recovery of its coal costs in its rates, it would be sub-

---

[3] The complete text of Section 318 is set out in the Appendix, *infra*, 88a-89a.

ject both to a requirement under the FPA (*i.e.*, that it not recover in its rates the full amounts it had paid SOCCO for coal) and to a requirement under PUHCA (*i.e.*, that it pay cost to SOCCO for the coal it purchases) with respect to what it alleged to be the same "subject matter." Ohio Power argued that Section 318 establishes that in such circumstances the FPA-based requirement be given no effect; FERC must permit Ohio Power to pass on its full costs of coal to its customers.

2. Following an investigation, FERC concluded that Section 318 did not require it to include Ohio Power's costs of captive coal in Ohio Power's rate base, regardless of how far those costs exceeded the market price of coal. As FERC viewed it, while PUHCA authorized the SEC to regulate the intra-corporate price for coal transferred among American Electric Power affiliates, that statute did not bar FERC—operating under a statutory mandate to protect ratepayers from excessive rates—from prohibiting the pass-through of any portion of a utility's coal costs that led to rates that were not "just and reasonable" in light of market conditions. App., *infra*, 49a-55a. FERC based that conclusion on, *inter alia*, the SEC's repeated statements that it has neither the authority nor the intent to engage in rate-making when it exercises its powers under PUHCA. App., *infra*, 54a.

Turning to the facts of this case, FERC found that Ohio Power had paid SOCCO about 25-33% over prevailing market prices for coal during the period from 1982-1986. App., *infra*, 73a-74a. In reaching that conclusion, FERC rejected various arguments advanced by Ohio Power that its costs for fuel were reasonable. App., *infra*, 60a-71a. For example, Ohio

Power had argued that its higher costs were justified by "the long-term reliability of a contract with an affiliate," App., *infra*, 62a, and that the comparable market price had been calculated on the basis of coal contracts entered into at a different time—*i.e.*, contracts of a different "vintage." See App., *infra*, 62a-63a. FERC, however, found that Ohio Power had failed to introduce evidence indicating "any circumstances in the coal market when the [SOCCO] contract was made [in 1971] that would justify unusually high prices." App., *infra*, 64a. Although FERC agreed "that vintages could affect the prices [for coal], and should be looked at carefully," FERC found that the prices used for comparison purposes here "may be higher, *i.e.*, skewed in favor of Ohio Power, than if only contracts of the [1971] vintage were used for comparison." *Ibid.*

FERC ordered Ohio Power to refund to ratepayers the difference between the market price and the higher amount it actually paid SOCCO during the relevant period and to calculate future rates on a comparable market basis.[4] App., *infra*, 79a-81a. FERC noted that "[e]stablishing the reasonable cost of the affiliate coal supply by a comparison with the competitive market allows Ohio Power the same

---

[4] FERC limited its order to the period from 1982 through 1986. FERC also found that Ohio Power had paid SOCCO "50% above market in 1980 [and] 94% [above market] in 1981," the two years before the initiation of proceedings before FERC. App., *infra*, 73a. FERC did not order refunds of the excess charges in those years, however, because it had not established its comparable market test until late in 1981. Until that time, "Ohio Power would not necessarily have anticipated that fuel charges within the cost-based limits imposed by the SEC might not be acceptable under [FERC's] regulation." App., *infra*, 80a.

chance to earn a return on investment in its affiliate coal mine as an independent supplier of coal." App., *infra*, 77a. Thus, "not only must cost recovery be limited to the market price when actual costs exceed market price, but fuel charges must be allowed up to the market price, even if actual costs are less." App., *infra*, 78a.[5] Ohio Power's petition for rehearing was denied. App., *infra*, 82a-87a.

3. A panel of the D.C. Circuit vacated FERC's order, with one judge concurring only in the judgment. The panel majority ruled that "[t]he price term of sales contracts between associated companies [is] subject to SEC jurisdiction under PUHCA * * * and [is] therefore a subject matter under section 318 if such price term is also subject to the requirements of the FPA." App., *infra*, 25a. In the majority's view, the FERC orders at issue "set * * * a different price term for such a contract" and therefore "[t]he conclusion that the same subject matter is implicated is inescapable." App., *infra*, 25a-26a. The majority believed that Section 318 operated to prevent such dual regulation. App., *infra*, 29a-31a. The majority rejected FERC's argument that Section 318 barred FERC from exercising its ratemaking authority only where it was imposing requirements that actually conflicted with those imposed by the SEC or

---

[5] Ohio Power argued that a failure to permit it to pass through the full costs of the SOCCO coal would "preclude it from recouping high start-up costs as the costs of mining drop relative to market price." App., *infra*, 77a-78a; see also App., *infra*, 75a-76a. FERC responded that "if, as Ohio Power argues in this case, its investment in [SOCCO] will prove to be a good deal in the long run, it will benefit by recouping losses [when the market price is higher than cost] that result from the refunds of excessive fuel costs required by this Opinion and order." App., *infra*, 78a.

PUHCA, not when FERC and the SEC were merely regulating the same "subject matter." *Ibid.*

Finally, the panel majority held that its decision was "informed" by this Court's cases "that disfavor conflicting regulation resulting in trapped costs." App., *infra*, 31a, citing *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 971 (1986), and *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 372-374 (1988). According to the majority, by refusing to permit Ohio Power to pass through costs that the SEC had permitted it to incur, FERC had "in effect" reformed the agreement between Ohio Power and SOCCO, in violation of the SEC's orders. App., *infra*, 32a.

Concurring in the judgment, Judge Mikva took the position that, because Section 318 speaks in terms of conflicting "requirements" of FERC and the SEC, FERC is divested of jurisdiction under Section 318 only where the "requirements" the SEC and FERC seek to impose are in actual conflict. He perceived no such conflict here. App., *infra*, 35a-38a. Judge Mikva nonetheless agreed with the majority that the FERC orders had to be vacated, because, in his view, FERC's refusal to permit Ohio Power to include its full costs of coal in its rates violated a FERC regulation providing that "[w]here the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such costs shall be deemed to be reasonable and includable in the adjustment clause." 18 C.F.R. 35.14(a)(7). Judge Mikva rejected FERC's interpretation of that rule, under which it merely "creates a presumption of reasonableness, not a conclusive finding of reasonableness" with respect to pricing. App., *infra*, 43a.

4. This Court reversed. *Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990). Before this Court, the primary argument advanced by FERC and the SEC was that Section 318 of the Federal Power Act ousts FERC of jurisdiction only when the two agencies' regulations of a particular subject matter were in conflict. This Court, however, adopted an interpretation of Section 318 that differed from that of all of the parties and under which that Section did not bar FERC's order. The Court held that Section 318 was not "a general conflicts provision, policing the entire regulatory border between the two agencies." 111 S. Ct. at 421. Instead, the Court held, Section 318 merely addresses the "Conflict of jurisdiction" in four specifically enumerated areas: "[1] the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, [2] the method of keeping accounts, [3] the filing of reports, or [4] the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." 16 U.S.C. 825q. See 111 S. Ct. at 419-422.

The Court then explained that Section 318 does not decide this case because this case does not involve requirements imposed by both FERC and the SEC with respect to any of the four categories mentioned above. In particular, the Court observed that the only enumerated area "conceivably pertinent is contained within" the fourth category above—the "acquisition or disposition" of a security, capital asset, facility, or other subject matter. 111 S. Ct. at 422. Yet, the Court held, although the SEC might be said to have regulated "Ohio Power's acquisition of SOCCO" or "Ohio Power's acquisition of coal," it is "impossible to find any FERC requirement imposed 'with respect to the same' acquisition." 111 S. Ct. at 422 n.3. Similarly,

although FERC might be said to have imposed a requirement " 'with respect to the disposition' of electric power," that requirement "is still a requirement with respect to a *different* subject matter from * * * the acquisition of SOCCO." 111 S. Ct. at 422. "The combination of SEC requirements with respect to the acquisition of SOCCO and FERC requirements with respect to the disposition of electric power would not bring § 318 into play." *Ibid.*

The Court remanded the case to the D.C. Circuit for resolution of two claims that Ohio Power had raised but that had not yet been decided. First, the D.C. Circuit was to resolve the question whether FERC's decision violated its own regulation, 18 C.F.R. 35.14(a)(7), as Judge Mikva would have held. 111 S. Ct. at 422. Second, the D.C. Circuit was to address "the argument that the FERC-prescribed rate is not 'just and reasonable' because it 'traps' costs which the government itself has approved—disregarding a governmental assurance, possibly implicit in the SEC approvals, that Ohio Power will be permitted to recoup the cost of acquiring and operating SOCCO." *Ibid.*[6]

---

[6] In a concurring opinion, Justice Stevens, joined by Justice Marshall, stated that, "[e]ven if § 318 were read broadly to give the SEC priority over FERC whenever the requirements of the two agencies conflict," he would nonetheless have reached the same conclusion because "[t]here is no risk of conflict between the requirements of the SEC and FERC in this case." 111 S. Ct. at 423. He reasoned that Congress could not have intended to create the gap opened up by the D.C. Circuit opinion, in which utilities owned by holding companies would be relieved of regulation by FERC by virtue of their corporate structure. 111 S. Ct. at 423-424. In Justice Stevens's view, Congress "intended [utilities owned by holding companies] to be subject to the regulation of both the SEC and FERC as much as practical." 111 S. Ct. at 424.

5. On remand, the D.C. Circuit first adopted Judge Mikva's views regarding FERC's regulation, rejecting FERC's argument that 18 C.F.R. 35.14(a)(7) merely establishes a rebuttable, not conclusive, presumption that fuel prices subject to the jurisdiction of another regulatory body are "reasonable" for FERC's rate-making purposes. App., *infra*, 7a-9a.

In what it termed "a separate ground for remand" to FERC, App., *infra*, 14a, the panel went on to hold that "the overlapping authorities [of FERC and the SEC] have resulted in unavoidable conflicting requirements for Ohio Power." App., *infra*, 10a. The court was "unpersuaded by the argument that no conflict exists because FERC is simply regulating how much Ohio Power can charge for power, not how much Ohio Power pays for SOCCO coal." [7] *Ibid.* The panel reasoned that:

> By declaring a portion of the SOCCO coal price unreasonable and therefore not includable in Ohio Power's wholesale rate, FERC is undeniably affecting the economic relationship between Ohio Power and SOCCO, a relationship approved by, and under the jurisdiction of, the SEC.

Ibid. According to the panel, "Ohio Power will suffer regulatory dissonance whenever the market price de-

---

[7] In so ruling, the panel explained its divergence from this Court's earlier decision on the ground that while "the Supreme Court advised us that § 318 is not the mechanism by which the overlapping jurisdiction issue may be resolved * * *[,] [t]he Court left for us * * * the task of deciding how to reconcile the conflict, if any, created by FERC's attempt to allow only a market-based price for SOCCO coal when calculating wholesale rates and the SEC's orders requiring Ohio Power to pay either cost or no more than cost for SOCCO coal." App., *infra*, 10a.

viates from cost." *Ibid.*[8] The panel found "the resolution of this conflict in the plain language of [Section 13(b)]," and the principle that the plain language of what it believed to be the more specific statute, Section 13(b) of PUHCA, should trump what it regarded to be the more general language of FPA Sections 205 and 206, which obligate FERC to determine whether all interstate wholesale electric rates are "just and reasonable." App., *infra*, 11a.

The panel also concluded that this conflict between Section 13(b) of PUHCA and Sections 205 and 206 of the FPA had resulted in impermissible cost-trapping since FERC had employed "a recovery calculation inconsistent with an SEC determination governing an inter-affiliate transfer subject to § 13(b) of the PUHCA." App., *infra*, 14a. Finally, the court dismissed Justice Stevens's concern that Congress could not have intended to shield holding company affiliates from FERC's jurisdiction: in the court of appeals' view, FERC is not "powerless to affect the SEC's price-approval process," since FERC can provide its comments to the SEC concerning any proposed inter-affiliate transaction or "could conceivably ask the SEC to investigate whether the cost-based price for SOCCO coal violated 'any rule or regulation' of the PUHCA." App., *infra*, 14a.

---

[8] The SEC filed an *amicus* memorandum with the D.C. Circuit explaining that it viewed its four orders as establishing "a cost-based pricing standard consistent with the provisions" of Section 13(b) of PUHCA, 15 U.S.C. 79m(b). SEC Statement at 5. The SEC also stated that its memorandum "addresses only the meaning of the SEC's orders and does not take a position as to what effect, if any, the SEC's interpretation should have on the resolution of the case." SEC Statement at 2 n.1. The panel agreed with the SEC that the four SEC orders—if not the statute itself—mandated a price "equal to cost" for the coal. App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals departs substantially both from this Court's reasoning in its prior disposition of this case and from this Court's statement of the issues open for consideration by the court of appeals on remand. Moreover, the court of appeals' latest decision once again ousts FERC—and threatens to oust state regulatory agencies—from jurisdiction over a key component of rates charged by utilities affiliated with holding companies. In addition, it gives such utilities, merely by virtue of their corporate affiliation, a broad exemption from regulatory restrictions imposed by the FPA on all other utilities, in direct contravention of Congress's determination to subject such firms to dual regulation under both the FPA and PUHCA.

The court of appeals compounded its error by rejecting FERC's construction of its own regulation. Moreover, by virtue of the ruling below, FERC cannot close the regulatory gap created by the court of appeals' opinion simply by amending that regulation. For under the D.C. Circuit's separate ground for decision, in no circumstances would FERC—or, under the same reasoning, any state ratemaking body—have the authority to regulate the pass-through of captive fuel costs by holding company affiliates. Accordingly, any amendment to FERC's regulation would be futile, and the possibility of such amendment ought not insulate the D.C. Circuit's more important, substantive ruling from further review.

1. a. The decision of the court of appeals cannot be squared with this Court's prior disposition of this case. This Court's remand order did not provide for the court of appeals to determine whether there was a general conflict between regulation of Ohio Power's

rates under the FPA and the requirements of PUHCA regarding inter-affiliate transactions; as we explain below, that issue had essentially been decided by this Court in its application of Section 318 to this case. See pp. 20-22, *infra*. Instead, the Court left open a much more specific question: the validity of the argument "that the FERC-prescribed rate is not 'just and reasonable' because it 'traps' costs which the government itself has approved—disregarding a governmental assurance, possibly implicit in the SEC approvals, that Ohio Power will be permitted to recoup the cost of acquiring and operating SOCCO." 111 S. Ct. at 422. Resolving that question would have required the D.C. Circuit to inquire whether the SEC orders implicitly gave assurances that Ohio Power would be able to recoup its investment in SOCCO or its costs of operating SOCCO; whether, if so, Ohio Power had in fact recouped its investment in SOCCO or its costs of operating SOCCO; and whether, if there were such assurances and Ohio Power had not recouped its investment or its operating costs, the FERC-prescribed rate is not "just and reasonable," in light of all the facts of this case.

The D.C. Circuit did not undertake any of the above inquiries. Instead, the court of appeals undertook the same inquiry—and reached the same result—as it had before. This Court remanded for an inquiry into the scope of Ohio Power's justifiable reliance interest, if any, and the extent to which it had been satisfied. Instead of reviewing FERC's resolution of those issues or remanding to FERC for its consideration of them in the first instance, the D.C. Circuit once again ruled that PUHCA required Ohio Power's costs for coal to be passed through in full to its wholesale customers, regardless of the extent to which those costs exceeded market prices or the na-

ture, extent, justifiability, or continuing validity of any reliance interest created by the SEC orders. In reaching that conclusion, the court of appeals revisited issues already decided by this Court and failed to decide the issue that this Court had determined was crucial to resolution of this case.

b. The position adopted by the D.C. Circuit on the issue it chose to resolve is mistaken as a matter of law. It has long been settled that, even where two entirely distinct statutes are involved, so long as "there is no positive repugnancy between two laws a court must give effect to both." *Connecticut National Bank* v. *Germain*, 112 S. Ct. 1146, 1147 (1992); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019 (1984); *Rosenberg* v. *United States*, 346 U.S. 273, 294-295 (1953) (Clark, J., concurring). The same principle applies with even greater force where, as here, Congress enacted the two statutes simultaneously, as part of a single piece of legislation—the Public Utility Act of 1935. In those circumstances, it should be presumed that Congress knew that it was enacting two statutes that imposed regulations on some of the same entities and that Congress intended all provisions of both statutes to apply to those entities. Cf. *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513-514 (1949).[9]

The Public Utility Act had "two primary and related purposes: to curb abusive practices of public

[9] The D.C. Circuit resolved the "conflict" it saw between the two statutes by employing the canon of statutory construction that "when a conflict arises between specific and general provisions of the same legislation, the courts should give voice to Congress's specific articulation of its policies and preferences." App., *infra*, 11a. Because there was no conflict in this case, however, the predicate for application of that canon was absent.

utility holding companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 758 (1973). The first of those purposes resulted in PUHCA, whose administration is entrusted to the SEC. The second resulted in the FPA, whose administration is entrusted to FERC.

The first purpose arose in response to widespread abuses by holding companies and their subsidiaries, including the "excessive charges" that operating subsidiaries had to pay to service and supply affiliates resulting from "an absence of arm's-length bargaining," 15 U.S.C. 79a(b)(2), and the allocation of costs among holding company subsidiaries to thwart effective state regulation, see 15 U.S.C. 79a(b)(2) and (3). To eliminate those primarily financial abuses, PUHCA is directed largely toward financial transactions, corporate structures, acquisitions of assets, and potential conflicts of interest. Congress therefore entrusted the administration of PUHCA to the SEC, the agency with expertise in financial transactions and corporate structure. Congress did not give the SEC general authority over rates charged by utilities affiliated with holding companies, nor did Congress give the SEC any of the machinery ordinarily associated with rate regulation, such as the power to suspend rates and order refunds of overcharges to a utility's customers where necessary.[10]

---

[10] The SEC has consistently disavowed the authority or intent to engage in ratemaking under PUHCA. See, *e.g.*, App., *infra*, 52a-53a & n.18 (quoting sources). See also *City of Lafayette* v. *SEC*, 454 F.2d 941, 955-956 (D.C. Cir. 1971), aff'd *sub nom. Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 (1973) (The Public Utility Act did not grant the SEC regulatory authority over the "operations" of a utility, and the SEC

The second purpose resulted from an entirely different problem—the regulatory gap created by *Public Util. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), in which this Court held that interstate wholesale sales of electricity were beyond the reach of state regulation. The FPA was thus directed primarily at operational and ratemaking issues, rather than issues of corporate structure and securities regulation. Congress therefore entrusted the administration of the FPA to the Federal Power Commission—and later to its successor, FERC—the agency most qualified to deal with the technical and policy issues that arise in the course of regulating energy generation and transmission. The FPA requires utilities to file their rate schedules with FERC, see 16 U.S.C. 824d(d), and authorizes FERC to suspend any rate increase for up to five months, order refunds for rates it finds to exceed a "just and reasonable" level, and prescribe rates to be charged prospectively. See FPA §§ 205(e), 206(a), 16 U.S.C. 824d(e), 824e(a).

It is apparent from the history of the Public Utility Act that Congress intended to subject all utilities to rate regulation by FERC and to subject all utility holding companies to regulation by the SEC. A utility that falls into both categories is consequently subject to regulation under both statutes. Nothing in the Public Utility Act or elsewhere suggests that Congress believed that, by subjecting utility holding companies to regulation by the SEC, it was remedying the problem —the existence of the "*Attleboro* gap"—that caused it to subject all utilities rate regulation by FERC.[11]

---

therefore "stands in a different posture from the FPC, which * * * has regulatory jurisdiction over operations in view of its authority [over utility rates].").

[11] Cf. PUHCA § 21, 15 U.S.C. 79u ("Nothing in this chapter shall affect * * * the jurisdiction of any other commission,

Accordingly, full effect should be given to Congress's determination to subject public utility holding companies to the admittedly stringent requirements imposed by the dual system of regulation. The D.C. Circuit's result, which would entirely relieve Ohio Power of certain regulatory requirements applicable to every other utility, merely because Ohio Power is organized as a part of a public utility holding company, is unwarranted.[12]

To be sure, this Court's remand order in this case recognized the fact that there may be cases in which FERC's regulation of a utility's rates under the FPA would be affected by prior regulation by the SEC under PUHCA. The "just and reasonable" standard under which FERC reviews rates pursuant to the FPA is broad and flexible, and "does not compel [FERC] to use any single pricing formula." *Mobil Oil Exploration & Producing Southeast Inc.* v. *United Distribution Cos.*, 111 S. Ct. 615, 624 (1991) (interpreting same language in Natural Gas Act). The standard is plainly flexible enough to permit FERC, in its rate regulation, to accommodate a utility's justifiable reliance on SEC orders under PUHCA.

---

board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder.").

[12] As Justice Stevens noted, "Ohio Power would be allowed to buy coal at prices that would be higher than those paid by any utility not owned by a holding company, and then pass those higher costs along to its customers." 111 S. Ct. at 424. Congress did not "intend[] to relieve utilities owned by holding companies of substantial technical regulation because of their corporate structure. It intended those utilities to be subject to the regulation of both the SEC and FERC as much as practical." *Ibid.*

For example, if a utility makes a substantial investment in an affiliate in justifiable reliance on SEC orders under PUHCA permitting inter-affiliate transactions at cost, FERC would have to take into account whether its rate regulation of the utility would undermine the utility's justifiable reliance interest or the purpose underlying the SEC orders. But that does not mean abdication of rate regulation. It is improbable that any justifiable reliance interest would extend indefinitely into the future or be sustainable regardless of surrounding circumstances. Thus, to address the issue the Court left open on remand, it would be necessary to consider such factors as the nature and extent of the utility's justifiable reliance interest, whether the utility has recovered its investment, and whether surrounding circumstances have changed in such a manner that reliance on the SEC's orders is no longer justifiable. Instead of addressing those factors, the D.C. Circuit simply resurrected its holding that PUHCA ousted FERC of regulatory jurisdiction altogether. The fact that FERC must take into account the effects of the SEC's orders in its ratemaking proceedings, however, lends no support to the court of appeals' conclusion that FERC must suspend its ordinary processes and simply permit a utility to pass through to its customers the entire costs of all inter-affiliate transactions.[13]

c. In its previous decision in this case, this Court recognized the dual regulatory requirements imposed

---

[13] Although Ohio Power argued on remand that FERC must simply allow it to pass through the full costs of SOCCO coal to its ratepayers, Ohio Power did not argue that the rates set by the FERC order under review were not "just and reasonable" because they did not permit it to recover its investment in SOCCO or because of their impact on its overall rate of return on prudent investment.

by the Public Utility Act. In applying its interpretation of Section 318 to the facts of this case, this Court had to determine whether FERC and the SEC had each imposed some requirement "with respect to * * * the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." See 111 S. Ct. at 422. The Court decided that they had not, since it was "impossible," in this Court's words, "to find any FERC requirement imposed" with respect either to "[t]he acquisition of SOCCO by Ohio Power" or Ohio Power's "acquisition of coal." *Id.* at 422 & n.3. This Court stated clearly that FERC's requirements were imposed "with respect to the *disposition* of electric power," *ibid.*, not the acquisition of any asset or material.

In contrast, the central premise of the court of appeals' decision is that FERC and the SEC *are* both imposing requirements—indeed, conflicting requirements—on Ohio Power's acquisition of coal. The court of appeals defended its determination that "the overlapping authorities have resulted in unavoidable conflicting requirements for Ohio Power," by stating that it was "unpersuaded by the argument that no conflict exists because FERC is simply regulating how much Ohio Power can charge for power, not how much Ohio Power pays for SOCCO coal." App., *infra*, 10a. The D.C. Circuit thus rested its opinion on its belief that FERC's FPA-based regulation of the disposition of electric power—"how much Ohio Power can charge for power"—conflicts with PUHCA's mandate of an at-cost standard for Ohio Power's acquisition of coal—"how much Ohio Power pays for SOCCO coal." Yet this Court specifically found it "impossible to find any FERC requirement" imposed with respect to that acquisition. 111 S. Ct. at 422 n.3.

In short, the court of appeals' holding on remand that FERC's regulation of the disposition of electric power automatically conflicted with PUHCA's mandates concerning Ohio Power's acquisition of coal cannot be reconciled with this Court's prior ruling that FERC had not imposed a requirement with respect to Ohio Power's acquisition of coal. This Court, instead, intended that any consequences of the SEC orders in a case such as this would be accommodated under the broad "just and reasonable" standard of the FPA.

2. This case also involves a second ruling by the D.C. Circuit, which we likewise believe is erroneous: the conclusion that the language of the FERC regulation at 18 C.F.R. 35.14(a)(7)—which specifies that where "the cost of fuel * * * is subject to the jurisdiction of [another] regulatory body, such cost *shall be deemed* reasonable and includable in the [fuel] adjustment clause"[14] (emphasis added)—creates a conclusive presumption of "justness and reasonableness" under the FPA. According to the court of appeals, the regulation requires FERC to permit Ohio Power to pass through the costs of SOCCO coal in Ohio Power's rates, regardless of whether FERC ultimately concludes the cost is not "just and reasonable" when reexamined in a full-blown Section 205 or 206 proceeding.

FERC could in theory attempt to remedy the problem created by the court of appeals' decision on this point prospectively by repromulgating the regulation with language clarifying its meaning. But, even if 18

---

[14] A "fuel adjustment clause" allows a utility to pass through the cost of fuel on a provisional basis without a full-fledged rate proceeding. Such pass-throughs are generally reviewable in the utility's next rate proceedings under Section 205 or 206 of the FPA.

C.F.R. 35.14(a)(7) were repromulgated in that manner, the court of appeals would still, under its principal ruling in this case, find FERC precluded from examining whether a utility affiliated with a holding company could pass through the costs of its inter-affiliate transactions.[15] Accordingly, the existence of this regulatory issue ought not shield from review the D.C. Circuit's statutory holding.

In any event, the D.C. Circuit's construction of the regulation is unsound. The court of appeals implicitly acknowledged that other courts have not uniformly interpreted use of the word "deemed" as creating a rebuttable presumption, determining that they "have *generally* found that it establishes a conclusive presumption." App., *infra*, 8a (emphasis added).[16] In light of that uncertainty as to the meaning of "deemed," the court of appeals should have deferred to FERC's construction of its own regulation. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). So long as the agency's construction is not plainly erroneous or inconsistent with the regulation, it "is deserving of substantial deference." *Mullins Coal Co.* v.

---

[15] The D.C. Circuit has jurisdiction to review all FERC orders. 16 U.S.C. 825*l*(b).

[16] As one court has put it, "[t]he words 'deem' and 'deemed' when used in statutes have been construed to establish a conclusive presumption in some instances, but only a rebuttable presumption in other cases, depending largely upon the context in which they are used." *Brimm* v. *Cache Valley Banking Co.*, 269 P.2d 859, 863-864 (Utah 1954) (citing examples and concluding that statutory provisions at issue created rebuttable presumption); see also *Bowers* v. *United States*, 226 F.2d 424, 431-433 (5th Cir. 1955) (Cameron, J., dissenting (citing authorities)).

Director, OWCP, 484 U.S. 135, 159 (1987); *Arkansas* v. *Oklahoma*, 112 S. Ct. 1046, 1059 (1992).

Moreover, there is a solid basis for FERC's interpretation here, for the court of appeals, in giving the word "deemed" conclusive effect, made it irreconcilable with the balance of 18 C.F.R. 35.14. First, the presumption of reasonableness is triggered only by affiliate fuel prices "subject to the jurisdiction of a regulatory body." It would have been irresponsible for FERC to abdicate its consumer protection mandate by imposing a conclusive presumption of reasonableness if a fuel price were merely subject to the jurisdiction of another agency, regardless of whether that agency had ratemaking authority or ever exercised its jurisdiction over the price in any way. Cf. *FTC* v. *Ticor Ins. Co.*, 112 S. Ct. 2169 (1992).

Second, the regulation merely states that such prices "shall be deemed to be reasonable and includable in the [fuel] adjustment clause." But charges includable in a fuel adjustment clause are plainly subject to review by FERC, both retroactively and prospectively, in full-blown rate proceedings under Sections 205 and 206 of the FPA.[17] See *Board of Water, Light & Sinking Fund Comm'rs* v. *FERC*, 931 F.2d 94, 95 (D.C. Cir. 1991) (citing *Associated Gas Distribs.* v. *FERC*, 706 F.2d 344, 348 (D.C. Cir. 1983)); see also App., *infra*, 79a n.101 (citing *Public Serv. Co. of N.H.*, 6 F.E.R.C. ¶ 61,299 (1979); *Electric Cooperatives of Kansas*, 14 F.E.R.C. ¶ 61,176

[17] As the final sentence of the regulation makes clear, "[f]uel charges by affiliated companies which do not appear to be reasonable may result in the suspension of the fuel adjustment clause *or* cause an investigation thereof to be made by [FERC] on its own motion under [S]ection 206 of the Federal Power Act." 18 C.F.R. 35.14(a)(7) (emphasis added).

(1981); *Carolina Power & Light Co.*, 17 F.E.R.C. ¶ 61,118 (1981); and *Delmarva Power & Light Co.*, 24 F.E.R.C. ¶ 61,199, at 61,461 (1983)).[18]

3. The D.C. Circuit's ruling essentially reinstated the rule of law that was established in its prior ruling in this case: that Ohio Power may use PUHCA and the SEC orders as a shield to preclude FERC from making any inquiry into whether Ohio Power's costs of coal may be fully recovered in "just and reasonable" rates. As was the court of appeals' prior holding, that holding appears to be applicable to all of the inter-affiliate sales and service contracts that the SEC has approved under PUHCA; under the court of appeals' holding, FERC is precluded from doing anything but rubber-stamping a utility's efforts to pass through the costs of those contracts in its wholesale rates.

In addition, the court of appeals' decision threatens to have an equally great effect on state utility regulatory bodies. The rationale of the court of appeals' decision is that the "at cost" standard of PUHCA Section 13(b) governs not merely the transfer price of goods and services sold among holding company affil-

---

[18] When FERC considered amending Section 35.14(a)(7) in 1979, it stated that, because under Section 35.14(a)(7) fuel costs may be passed through without prior approval by FERC, the Commission "has established several mechanisms by which it may monitor * * * costs recovered through fuel adjustment clauses." 44 Fed. Reg. 28,684. It went on to explain that those mechanisms included "audits," "review and investigation of fuel costs in conjunction with * * * wholesale rate changes," and "investigation of fuel costs under section 206 * * * either upon complaint or upon the Commission's own motion." *Ibid.*; see also *McDowell County Consumers Council, Inc.* v. *American Electric Power Co.*, 54 F.P.C. 361 (1975).

iates, but also the rate that the operating utility can charge its customers for electric power generated in part through use of those goods or services. If Congress so intended in Section 13(b), then, under standard Supremacy Clause principles, that determination would be fully binding upon the States. *Cf.* note 11, *supra*. Thus, it appears that state regulatory agencies would be bound, just as is FERC, to permit utility affiliates of holding companies to pass through in their rates the costs of goods and services purchased from affiliated firms. The court of appeals' decision accordingly threatens to intrude not only upon FERC's jurisdiction over interstate wholesale rates, but also upon the jurisdiction of the States to regulate intrastate and retail rates.

As we discussed in supporting the petition for a writ of certiorari the last time this case was before the Court, utilities affiliated with holding companies directly or indirectly serve 49 million households in 30 States and the District of Columbia. The legal consequences of the court of appeals' decision on remand appear to be at least as broad as were the consequences of its prior decision, affecting not merely the jurisdiction of FERC, but that of state regulatory agencies as well. Further review is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

WILLIAM S. SCHERMAN
General Counsel

JEROME M. FEIT
Solicitor

JOSEPH S. DAVIES
Deputy Solicitor

TIMM L. ABENDROTH
Attorney
Federal Energy Regulatory Commission

AUGUST 1992

---

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

LCP CHEMICALS & PLASTICS, INC., ET AL.,
MUNICIPAL WHOLESALE ELECTRIC CUSTOMERS OF
OHIO POWER COMPANY, INTERVENORS

On Remand from the United States Supreme Court

Argued Sept. 27, 1991

Decided Feb. 4, 1992

Edward Berlin, with whom Kenneth G. Jaffe and Edward J. Brady, Washington, D.C., were on the brief, for petitioner. Andrew L. Lipps, Washington, D.C., also entered an appearance for petitioner.

Joseph S. Davies, Deputy Sol., with whom William S. Scherman, Gen. Counsel, Jerome M. Feit, Sol., and Timm Abendroth, Atty., Washington, D.C., were on the brief,

for respondent. John Estes, Joanne Leveque, and Catherine C. Cook, Attys., F.E.R.C., Washington, D.C., also entered appearances for respondent.

Gregg D. Ottinger, with whom John P. Williams, Washington, D.C., and Lee F. Feinberg, Charleston, W.V., were on the brief, for intervenors.

James B. Liberman, Washington, D.C., was on the brief for amici curiae Registered Holding Co. Group, urging that the decision of the F.E.R.C. be reversed and the matter remanded to the Com'n.

James R. Doty, Gen. Counsel, Jacob H. Stillman, Associate Gen. Counsel, Katherine Gresham, Asst. Gen. Counsel, and Paul Gonson, Sol., S.E.C., Washington, D.C., were on the brief for amicus curiae.

Before MIKVA, Chief Judge, and SILBERMAN and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

Ohio Power Company, a producer of electricity, was subjected to the regulatory jurisdiction of two agencies, the Federal Energy Regulation Commission ("FERC") and the Securities and Exchange Commission ("SEC"). Specifically, FERC determined in a wholesale rate proceeding that the SEC-approved price paid by Ohio Power for coal from its associate Southern Ohio Coal Company ("SOCCO") could not be included in Ohio Power's wholesale rate to the extent that it was greater than the market price for comparable coal. *Ohio Power Co.*, 39 F.E.R.C. ¶ 61,098 (1987).

We initially granted Ohio Power's petition to vacate the FERC order on the ground that § 318 of the Federal Power Act insulated SEC-approved prices from FERC alteration. *Ohio Power Co. v. FERC*, 880 F.2d 1400, 1410 (D.C.Cir. 1989). Ruling that § 318 did not address the conflict faced by Ohio Power, the Supreme Court remanded the case to us. *Arcadia, Ohio v. Ohio Power Co.*, —— U.S. ——, 111

S.Ct. 415, 422, 112 L.Ed.2d 374 (1990). We now grant Ohio Power's petition to vacate the FERC order for the reasons discussed below.

BACKGROUND

I. *The Statutory Scheme*

In 1935, Congress enacted grants of authority to the SEC and FERC's predecessor, the Federal Power Commission, under an umbrella statute entitled the Public Utility Act, ch. 687, 49 Stat. 803 (1935). Title I, known as the Public Utility Holding Company Act ("PUHCA"), empowers the SEC to curb abuses affecting investors and consumers created by transactions between subsidiary associates of public utility holding companies. 49 Stat. 803 (1935) (codified as amended at 15 U.S.C. §§ 79a to 79z-6). The SEC discharges its responsibilities in large part under § 13 of the PUHCA, which makes transactions between associate companies unlawful unless they are approved by the SEC at terms found to be "in the public interest or for the protection of investors or consumers." 15 U.S.C. § 79m(b).[1]

Title II, known as the Federal Power Act ("FPA"), established the Federal Power Commission to oversee the

---

[1] Section 13(b) of PUHCA states in pertinent part that

> it shall be unlawful for any subsidiary company of any registered holding company . . . to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods, to any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the Commission by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies.

15 U.S.C. § 79m(b).

wholesale transmission and sale of interstate electric power. 49 Stat. 838 (1935) (codified as amended at 16 U.S.C. §§ 791a-825r). FERC, which succeeded the now-departed Federal Power Commission, fulfills a critical part of its mandate by setting "just and reasonable" wholesale electric rates under §§ 205 and 206 of the FPA. 16 U.S.C. §§ 824d & 824e. Thus, under the FPA and the PUHCA,

> FERC-regulated electric power companies [such as Ohio Power] that are subsidiaries or affiliates of registered public utility holding companies are therefor subject to SEC regulation as well.

Arcadia, 111 S.Ct. at 417; *see also Ohio Power Co.*, 880 F.2d at 1402-04 (summarizing statutory backdrop of this action).

II. *Factual Background*

Ohio Power Company produces electricity with coal-burning generation plants and is a subsidiary of one of the nation's largest public utility holding companies, American Electric Power Company. In 1971, Ohio Power entered into a lease with the owners of the Martinka Mine for development of coal by Ohio Power's subsidiary and associate, SOCCO. Before Ohio Power could capitalize SOCCO's mining operations by purchasing its stock, § 10 of PUHCA required the SEC to approve the proposed transaction. 15 U.S.C. § 79j. In its order of December 2, 1971, the SEC determined that Ohio Power could obtain coal from SOCCO at a price "based on an amount equal to the actual cost" of coal production including a reasonable rate of return on Ohio Power's capital investment. *Ohio Power Co.*, Holding Company Act Release ("HCAR") No. 17,383 (1971); *see Arcadia*, 111 S.Ct. at 417-18 (discussing history of Ohio Power's capitalization of SOCCO).[2]

---

[2] As observed by the Supreme Court, Ohio Power obtained three additional SEC approvals for various capital transactions with

This action came initially before us as a result of a May 28, 1982, wholesale rate increase application that Ohio Power filed with FERC pursuant to §§ 205 and 206 of the FPA. FERC eventually accepted the application except for Ohio Power's request to pass through the cost-based price that it paid for SOCCO coal. Asserting that comparable coal could be obtained at a cheaper market price, FERC found the SOCCO coal price unreasonable and therefore not includable in Ohio Power's wholesale rate. *Ohio Power Co.*, 39 F.E.R.C. ¶ 61,098, at 61,275 (1987). Ohio Power insisted the SEC alone had jurisdiction over the price that associates may charge each other for goods,[3] and sought judicial vindication.

Before this Court, Ohio Power and FERC argued that the controversy centered on the application of the jurisdictional conflicts provision of the Public Utility Act, § 318 of the FPA. *Ohio Power Co.*, 880 F.2d at 1405-09. The parties agreed § 318 provided that the requirements of the PUHCA govern when a company is subject to conflicting PUHCA and FPA regulation "with respect to the same subject matter." 16 U.S.C. § 825q. FERC defended its order on two grounds: first, by claiming there was no conflict between the agencies because the FERC order required Ohio Power to pay a market price that was less than cost and the SEC orders simply required Ohio Power to pay no more than cost; and second, by asserting that, regardless of conflict, since FERC was regulating wholesale rates and the SEC was regulating interassociates prices, the agencies were not regulating the "same subject matter." *Ohio Power Co.*, 880 F.2d at 1405.

SOCCO. *See Ohio Power Co.*, HCAR No. 20,515, 14 SEC Docket 928 (1978); *Southern Ohio Coal Co.*, HCAR No. 21,008, 17 SEC Docket 310 (1979); and *Southern Ohio Coal Co.*, HCAR No. 21,537, 19 SEC Docket 1309 (1980).

[3] SEC regulation 17 C.F.R. § 250.80(b) defines "goods" to include coal.

This Court agreed with Ohio Power that even if the SEC orders were read to enshrine cost only as a ceiling, Ohio Power was nevertheless subject to conflicting regulatory authorities in that FERC had "set by order a different price term" for a contract approved by the SEC. *Id.* at 1406. Similarly, we found that the two agencies were regulating the "same subject matter," and that therefore § 318 required FERC to defer to the SEC's approval of a cost-based price for SOCCO coal. *Id.* at 1408-09. In a separate opinion, Judge, now Chief Judge, Mikva concurred in the result, but on the alternative ground that FERC had violated one of its own regulations requiring it to "deem" reasonable and includable prices set by other regulatory bodies (here, the SEC). *Id.* at 1412-14 (construing FERC regulation 18 C.F.R. § 35.-14(a)(7)).

In its review, the Supreme Court adopted a reading of § 318 not advanced by "the parties, the interested agencies, [or] the Court of Appeals," *Arcadia*, 111 S.Ct. at 422 (Stevens, J., concurring), and found that the conflict affecting Ohio Power was not covered by § 318. *Id.* at 421-22. The *Arcadia* Court read § 318 as applying only to four specifically enumerated types of conflicts, and held that, although Ohio Power was subject to "overlapping regulatory jurisdiction of both the SEC and of FERC," *id.* at 417, § 318 was silent regarding the type of overlap asserted by Ohio Power in this case. *Id.* at 422.

Advising us that its interpretation of § 318 did not "end review of the FERC order," the Court remanded with instructions to resolve whether: (1) as Judge Mikva observed, FERC violated its own regulation; and (2) "the FERC-prescribed rate" is unjust and unreasonable because it " 'traps' costs which the government [the SEC] itself has approved". *Id.*

Justice Stevens wrote a concurring opinion, joined by Justice Marshall, in which he found that even if the overlap in authorities fell within the enumerated subjects of § 318, there was "no risk of conflict between the require-

ments of the SEC and FERC in this case." *Id.* at 423 (Stevens, J., concurring). Justices Stevens and Marshall, therefore, agreed with FERC that the two agencies were regulating different subject matters, with FERC overseeing "what portion of its fuel costs Ohio Power may pass along to its customers" and the SEC placing a ceiling on "the price which Ohio Power pays its [coal] supplier—SOCCO." *Id.* The concurrence ended by commenting that Congress's intent would be frustrated by a holding that would allow the SEC to hamper FERC's regulation of wholesale rates. *Id.* at 423-24.

ANALYSIS

I. *FERC Regulation 18 C.F.R. § 35.14(a)(7)*

As instructed by the Court, we have reviewed Part II of Judge Mikva's concurring opinion, which contended that a remand was required on the ground that 18 C.F.R. § 35.14(a)(7) of FERC's own rules precluded FERC from "imposing its market-price test" in the face of a cost-based coal price approved by the SEC. *Ohio Power Co.*, 880 F.2d at 1412-14. Judge Mikva concluded that "[u]nder the regulation, because the prices of Ohio Power's fuel from its affiliate are subject to the jurisdiction of the SEC, such costs must be conclusively presumed reasonable." *Id.* at 1414. We now adopt Judge Mikva's approach as reflecting the view of this panel.

Section 35.14(a)(7) addresses fuel price adjustment clauses in filed rate schedules, and provides in pertinent part:

> Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause.

18 C.F.R. § 35.14(a)(7). The dispute here focuses on the meaning of the word "deemed," with Ohio Power arguing

that it establishes a conclusive presumption for including such costs, and FERC urging that it sets only a rebuttable presumption, which in Ohio Power's case was disproved.

Judge Mikva began by remarking that "no deference is owed an interpretation at odds with the plain meaning of the text." *Ohio Power Co.*, 880 F.2d at 1413 (Mikva, J., concurring) (citing *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 381 (D.C.Cir.1983) ("When an agency's interpretation flies in the face of the language of the rules themselves it is owed no deference.")). He then found that "courts construing the word 'deemed' have generally found that it establishes a conclusive presumption." *Id.* (citing, e.g., *H.P. Coffee Co. v. Reconstruction Finance Corp.*, 215 F.2d 818, 822 (Emer.Ct.App.1954) (finding near "unanimous judicial determination that the word [deemed], when employed in statutory law, creates a conclusive presumption.")). In addition to *H.P. Coffee* and the other cases cited in the concurrence, we note also that two decisions from this Circuit have construed the term deemed and found that it created a conclusive presumption. *See Gaither v. Myers*, 404 F.2d 216, 218 (D.C.Cir. 1968) (finding that use of term deemed in a liability statute changed the common law rule of agency by making agency status turn solely on the consent of an owner to use a car, while the common law rule considered consent one of many factors); and *Forrester v. Jerman*, 90 F.2d 412, 413 (D.C.Cir.1937) (interpreting same statute as in *Gaither* and reaching same conclusion after finding that deemed "is unambiguous and leaves nothing for interpretation"). Given the unambiguous character of deemed, then, we find case law amply supports our finding that the plain language of § 35.14(a)(7) requires FERC to include in Ohio Power's wholesale rate the SEC-approved cost-based price for SOCCO coal.

FERC attempts to cloud the clear meaning of deemed by pointing to the complicated rulemaking history of § 35.14(a)(7). Brief of Respondent at 31-32. We agree with Judge Mikva's past disposition of this argument and

find that, if anything, the regulatory history cuts against a rebuttable presumption interpretation of deemed, particularly when considering the evolution of the regulation from its proposed form in 1973 to its final promulgation in 1974. *See Ohio Power Co.*, 880 F.2d at 1413-14. The original version stated that "[o]nly the reasonable cost of fuel [purchased from an associate] may be included" in the wholesale rate, 38 Fed.Reg. 17,253 (1973), language consistent with the rebuttable presumption urged by FERC. But the regulation as ultimately issued abandoned this formulation and instead contained the "such cost shall be deemed reasonable and includable" language that we read as creating a conclusive presumption. 39 Fed.Reg. 28,911 (1974).

Finally, we find prior administrative pronouncements regarding the meaning of § 35.14(a)(7) of little moment to the extent they are not consistent with the unambiguous terms of the regulation. *See Union of Concerned Scientists*, 711 F.2d at 381. If FERC wishes to have § 35.14(a)(7) create only a rebuttable presumption, then it may do so explicitly through the required process. As currently written, however, we agree with Judge Mikva that "section 35.14(a)(7) establishes, as a policy matter, that if another regulatory body has already passed on the fuel price, then FERC will abide by that determination." *Ohio Power Co.*, 880 F.2d at 1414. We therefore hold that under § 35.14(a)(7), FERC was obliged to find "reasonable and includable" Ohio Power's fuel costs as approved by the SEC, and we remand to FERC for further findings not inconsistent with this opinion.

II. *Reconcilation of the Overlapping Regulatory Authorities*

By precluding FERC from declaring an SEC-approved price unreasonable, our interpretation of § 35.14(a)(7) provides Ohio Power with some succor from the "overlapping regulatory jurisdiction of both the SEC and of

FERC" found by the *Arcadia* Court. 111 S.Ct. at 417. However, we believe that more than the regulation requires this result.

In *Arcadia*, the Supreme Court advised us that § 318 is not the mechanism by which the overlapping regulatory jurisdiction issue may be resolved. The Court left for us, though, the task of deciding how to reconcile the conflict, if any, created by FERC's attempt to allow only a market-based price for SOCCO coal when calculating wholesale rates and the SEC's orders requiring Ohio Power to pay either cost or no more than cost for SOCCO coal.

To begin, we do find that the overlapping authorities have resulted in unavoidable conflicting requirements for Ohio Power. Justice Stevens in his *Arcadia* concurrence noted that the "market price for coal during the time relevant to this proceeding has been less than SOCCO's costs." *Arcadia*, 111 S.Ct. at 423. From this, he reasoned that no conflict existed since the SEC orders did no more than "establish a ceiling requiring that the price SOCCO charges its affiliates for coal remain at or below its costs." *Id.*

However, Ohio Power represents that the "market price, calculated according to FERC's methodology, has exceeded the cost of mining Martinka coal in some months." Brief of Petitioner Ohio Power at 24 & n. 15. FERC does not contest this representation. Moreover, if one interprets the SEC orders as establishing cost as both a floor and a ceiling, then Ohio Power will suffer regulatory dissonance whenever the market price deviates from cost.

We are also unpersuaded by the argument that no conflict exists because FERC is simply regulating how much Ohio Power can charge for power, not how much Ohio Power pays for SOCCO coal. By declaring a portion of the SOCCO coal price unreasonable and therefore not includable in Ohio Power's wholesale rate, FERC is undeniably affecting the economic relationship between Ohio Power and SOCCO, a relationship approved by, and under the jurisdiction of, the SEC. *Cf. Nantahala Power &*

Light v. Thornburg, 476 U.S. 953, 971, 106 S.Ct. 2349, 2359, 90 L.Ed.2d 943 (1986) (overturning action of a state regulatory body that, by its orders establishing retail rates, required the regulated entity to "pretend that it is paying less for the power it receives . . . , under agreements not subject to [the state's] jurisdiction, than is in fact the case.").

We find the resolution of this conflict in the plain language of the statute authorizing the SEC to regulate sales contracts of associate companies. Section 13(b) of the PUHCA empowers the SEC to approve the price of inter-associate sales of goods, such as coal, and directs the SEC to price these goods "at cost, fairly and equitably allocated among [associate] companies." 15 U.S.C. § 79m(b). Here, the SEC did just that with its four orders approving Ohio Power's relationship with SOCCO, which reflected § 13(b)'s mandate to price SOCCO's coal "at cost." [4]

In contrast to the SEC's specific statutory mandate to establish a cost-based price for sales of goods between associates, FERC can point to no equivalent authority besides its general charge to establish "just and reasonable" wholesale electric rates. 16 U.S.C. §§ 824d & 824e. Of course, it is black letter law that when a conflict arises between specific and general provisions of the same legislation, the courts should give voice to Congress's specific articulation of its policies and preferences. 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05, at 105 n. 19 (5th ed. 1992). Accordingly, we hold that Congress in § 13(b) of the PUHCA authorized the SEC to set the price of SOCCO coal "at cost," and in so doing constrained FERC from altering that price under its "just and reasonable" rate-setting authority.

In support of its order, FERC advances the argument that the SEC orders "do not appear to mandate the cost-based price where a market price could be lower, rather they permit a price up to a cost-based price." *Ohio Power*

---

[4] *See supra* note 1 and accompanying text.

Co., 39 F.E.R.C. ¶ 61,098, at 61,276 (1987), *quoted in* Brief of Respondent at 26. Citing SEC Rule 92, 17 C.F.R. § 250.92, the Commission found that "not only does the SEC not require a cost-based price for the subsidiary coal, *the SEC may require* a market-based price for subsidiary coal if the market price is lower than cost." *Id.* (emphasis added).

Without addressing whether the SEC does in fact have the authority to establish a lower-than-cost market price,[5] even FERC concedes that Rule 92 empowers the SEC alone to set such a price. FERC does not cite, and we can not find, any indication in the orders that the SEC was exercising its authority to establish a below-cost market price for SOCCO coal. The orders do not mention market price as a limit to price, nor do they require Ohio Power to show that comparable coal was unavailable before paying cost for SOCCO coal.[6]

Instead, the orders appear to embrace the cost-based price principles required by SEC Rules 90 and 91. 17 C.F.R. §§ 250.90 & 250.91. Consistent with § 13(b) of PUHCA, SEC Rule 90(a) prohibits associates from selling goods to each other at "more than cost," 17 C.F.R. § 250.90(a), and Rule 91(a) defines "more than cost" as "not exceed[ing] a fair and equitable allocation of expenses." 17 C.F.R. § 250.91(a).[7] The SEC orders har-

---

[5] The SEC does have express statutory authority under § 13(b) to deviate from the "at cost" standard when a transaction "involve[s] special or unusual circumstances." 15 U.S.C. § 79m(b). However, no one has suggested that the SEC invoked this source of authority in the orders concerning Ohio Power.

[6] According to its brief, the SEC "has long recognized" that a lower-of-cost-or-market interpretation would effectively eliminate affiliate transactions by preventing investors from keeping profits when cost is below market (to offset losses when cost is above market). Brief of Amicus SEC at 4. *See also Ohio Power Co.*, 880 F.2d at 1410 (observing that FERC interpretation of SEC orders places Ohio Power in a "tails-we-lose" situation).

[7] SEC Rule 90(d) does provide that the price of goods "need not be limited to cost," and then references the market-price cap

moniously track this language. For example, the 1971 order states that the "charges for coal by [SOCCO] will be based on an amount equal to the actual cost," *Ohio Power Co.*, HCAR No. 17,383 (1971), and the 1978 order states that the "price at which [SOCCO] coal is sold to [Ohio Power] will not exceed the cost thereof to the seller." *Ohio Power Co.*, HCAR No. 20,515, 14 S.E.C. Docket 928 (1978); *see also Southern Ohio Coal Co.*, HCAR No. 21,537, 19 S.E.C. Docket 1309 (1980) (stating that the price of SOCCO coal "will not exceed the cost thereof to the seller.").

That the 1978 and the 1980 orders, as well as SEC Rules 90 and 91, place more emphasis on cost as a ceiling rather than a floor is not surprising given the economic incentive of associate companies to pass through inflated costs for goods and services. *See* 15 U.S.C. § 79a (b)(2) (describing the following as one of the evils that make SEC regulation of associates necessary: "subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials"). But this concern with excessive charges does not diminish the exclusive role cost plays in establishing associate prices—Congress's use of the term "at cost" indicates that cost serves as a ceiling and a floor. To the extent there is downward flexibility in a cost-based price, we find that Congress did not make room for anyone other than the SEC to exercise this flexibility. We therefore find that the orders are better read as requiring Ohio Power to pay a price "equal to cost" for SOCCO coal, as prescribed by § 13(b) and the 1971 SEC order, and we reject FERC's attempt to clothe itself with the SEC's purported authority under Rule 92 to establish a market-based cap.[8]

---

discussed in Rule 92; but, as stated above, this provision was not relied upon by the SEC in this case.

[8] Although we grant the SEC's views no deference, we note that our interpretation of the SEC's orders is consistent with their submission in this case. *See* Brief of Amicus SEC at 5.

In response to the congressional intent concerns expressed in Justice Stevens's concurrence, we do not mean to say that FERC is powerless to affect the SEC's price-approval process. When the SEC receives for approval an associate transaction and the suggested prices at which goods will be sold, SEC Rule 28 requires notice in the Federal Register and an opportunity for comment on the proposal. 17 C.F.R. § 250.23. Such notice was provided as part of Ohio Power's applications to the SEC. Additionally, FERC could conceivably ask the SEC to investigate whether the cost-based price for SOCCO coal violated "any rule or regulation" of the PUHCA. *See* 15 U.S.C. § 79r(a). Thus, FERC may attempt to affect the price-approval process, but Congress has granted the SEC alone the authority to establish prices charged by associates for goods.

Therefore, regardless of whether FERC may under other circumstances set prices that trap costs created by orders of other governmental entities, we hold that FERC may not set a cost-trapping rate level where that effect is occasioned by a recovery calculation inconsistent with an SEC determination governing an inter-associate transfer subject to § 13(b) of the PUHCA.

CONCLUSION

In conclusion, we hold that 18 C.F.R. § 35.14(a)(7) prevents FERC from finding the coal price approved by the SEC not includable in determining Ohio Power's wholesale rate. As a separate ground for remand, we hold that the SEC properly discharged its authority under § 13(b) of the PUHCA by setting the price of coal sold by SOCCO to its associate Ohio Power "at cost," and that FERC must respect this specific grant of authority to the SEC. For the reasons given above, therefore, we allow the petition for review, and vacate and remand the order of FERC for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

Before: Mikva, Chief Judge; Silberman and Sentelle, Circuit Judges

ORDER

[Filed Apr. 14, 1992]

Upon consideration of the Petitions for Rehearing of respondent and intervenor it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

[Filed Apr. 14, 1992]

The Suggestions For Rehearing *En Banc* of respondent and intervenor have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam
FOR THE COURT

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

LCP CHEMICALS & PLASTICS, INC., ET AL.,
MUNICIPAL WHOLESALE ELECTRIC CUSTOMERS OF
OHIO POWER COMPANY, INTERVENORS

Argued Feb. 24, 1989

Decided July 28, 1989

Petition for Review of an Order of the
Federal Energy Regulatory Commission

Edward Berlin, with whom Andrew L. Lipps, Kenneth G. Jaffe, Washington, D.C., and Edward J. Brady, were on the brief, for petitioner.

Joanne Leveque, Attorney, F.E.R.C., with whom Catherine C. Cook, Gen. Counsel, and Joseph S. Davies, Deputy Sol., F.E.R.C., Washington, D.C., were on the brief, for respondent.

John Estes also entered an appearance for respondent.

Gregg D. Ottinger, Washington, D.C., and T.D. Kauffelt, Charleston, W. Va., were on the brief, for intervenors, Municipal Wholesale Electric Customers of Ohio Power Company and Industrial intervenors.

Before MIKVA, SILBERMAN, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

Concurring opinion filed by Circuit Judge MIKVA.

SENTELLE, Circuit Judge:

The Federal Energy Regulatory Commission (FERC) determined in a rate proceeding that Ohio Power Company's cost of coal purchased from an associated company was unreasonably high. The company has petitioned us to vacate the order on the grounds that it is for the Securities and Exchange Commission (SEC) to determine the reasonableness of contracts between associated companies. We grant the petition for the reasons set out below.

I. Background

A. *The Statute*

The central issue raised by petitioner concerns the applied meaning of the phrase "subject matter" in section 318 of the Federal Power Act (FPA), 16 U.S.C. § 825q, an issue to which section 13(b) of the Public Utility Holding Company Act of 1935 (PUHCA), 15 U.S.C. § 79m(b), is relevant. FPA § 318 and PUHCA § 13 were enacted in different titles of the Public Utility Act of 1935, ch. 687, 49 Stat. 803 (1935) (codified as amended principally at 15 U.S.C. §§ 79 to 79z-6 and 16 U.S.C. §§ 824-825r (1982 & Supp. V. 1987)), which initiated fed-

eral regulation of public utility holding companies theretofore insulated from effective state-level regulation by their multi-state operations. The broadly remedial purposes of the Public Utility Act included protection of investors, consumers, and the public from various abusive holding company practices, including non-arm's-length contracts within an associated group. *See* 15 U.S.C. § 79a(b)(2). (The definitions of public utility holding company, associate company, and similar terms are set out in section 2 of PUHCA, 15 U.S.C. § 79b. Those definitions are applicable to the present case but not in dispute.)

More particularly for our purposes, PUHCA § 13(b) makes unlawful contracts between associates of a public utility holding company,

> except in accordance with such terms and conditions and subject to such limitations and prohibitions as the [SEC] . . . shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies.

15 U.S.C. § 79m(b).[1] The SEC's Rule 90 prohibits associated companies from making or performing contracts

---

[1] The full text of section 13(b) is as follows:

> After April 1, 1936, it shall be unlawful for any subsidiary company of any registered holding company or for any mutual service company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the [SEC] by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such

for sale of goods or performance of services "at more than cost." 17 C.F.R. § 250.90(a)(2) (1988). Under the SEC's Rule 91, a transaction is deemed to meet that standard when the price "does not exceed a fair and equitable allocation of expenses . . . plus reasonable compensation for necessary capital procured through the issuance of capital stock. . . ." 17 C.F.R. § 250.91(a). The sale between associates of seller-produced goods is not "limited to cost," 17 C.F.R. § 250.90(d)(2), but such a seller still may not charge its associate more than a fair market price. 17 C.F.R. § 250.92(b).

Under the concurrently enacted provisions of the FPA, FERC regulates the justness and reasonableness of wholesale rates for electric power in interstate commerce. 16 U.S.C. §§ 824, 824d, 824e.[2] FERC's authority includes the power to determine that a "contract affect-[ing]" such a rate is "unjust, unreasonable, unduly discriminatory or preferential" and to prescribe a just and reasonable contract. 16 U.S.C. § 824e(a). Section 318 of the FPA provides that, in the absence of an SEC-granted exemption, the requirements of PUHCA govern when a company is subject both to a requirement of the

---

contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies. This provision shall not apply to such transactions as the [SEC] by rules and regulations or order may conditionally or unconditionally exempt as being necessary or appropriate in the public interest or for the protection of investors or consumers, if such transactions (1) are with any associate company which does not derive, directly or indirectly, any material part of its income from sources within the United States and which is not a public utility company operating within the United States, or (2) involve special or unusual circumstances or are not in the ordinary course of business.

15 U.S.C. § 79m(b).

[2] This power originally resided in the Federal Power Commission, of which FERC is the successor agency. 42 U.S.C. §§ 7172(a)(1)(B) & 7293 (1982).

SEC-administered PUHCA (including rules, regulations, and orders thereunder) "with respect to [an itemized list not at issue here] *or any other subject matter*" and of the FERC-administered FPA (including rules, regulations, and orders thereunder) "with respect to *the same subject matter*." 16 U.S.C. § 825q (emphasis added).

B. *OPCO, SOCCO, and the SEC*

Petitioner Ohio Power Company (OPCO) is an operating public utility subsidiary of American Electric Power Company, Inc. (AEP), a public utility holding company subject to PUHCA. OPCO purchases coal from its wholly-owned subsidiary Southern Ohio Coal Company (SOCCO) on essentially a cost-pass-through basis. Because both are associates of a public utility holding company, it is unquestioned that the coal-sale transactions between OPCO and SOCCO are subject to SEC jurisdiction under section 13(b).

The SEC has issued four orders that touch on the price of the OPCO-SOCCO coal transactions. *Ohio Power Company*, Holding Co. Act Release No. 17,383 (Dec. 2, 1971), permitted OPCO to inject capital into the corporate shell of SOCCO so SOCCO could develop OPCO-owned coal reserves "to assure a reliable supply of coal." *Id.* The SEC noted that, under the proposal before it SOCCO's charges to OPCO would be "based on" its actual costs plus a rate of return on capital no greater than that approved for OPCO by the Federal Power Commission, FERC's statutory predecessor. *Id.* at 2. There were no hearings and no findings, other than the ultimate finding that the proposed transaction was in the interest of the public, investors, and consumers. The order concluded with a "proviso that nothing in this order shall be construed as in any manner affecting the jurisdiction of any other regulatory authority with respect to the accounting or similar matter in connection with the proposed transactions." *Id. Ohio Power Company*, Holding Co. Act Release No. 20,515, 14 S.E.C.

Docket 928 (Apr. 24, 1978), approved OPCO's sale of its coal mines and leases to SOCCO and its further capital contribution to SOCCO. Again, the SEC stated that "[t]he price at which SOhio [SOCCO] coal is sold to AEP system companies will not exceed the cost thereof to the seller." *Id.* at 929.

The SEC required both OPCO and SOCCO to file quarterly financial statements and statements setting out "the quantities of coal sold to each buyer, the price of such coal and the method used to compute the cost of coal sold." *Id.* at 90. *Southern Ohio Coal Co.*, Holding Co. Act Release No. 21,008, 17 S.E.C. Docket 310 (Apr. 17, 1979), approved borrowings by SOCCO intended to reduce the cost of coal by providing cheaper capital. *Southern Ohio Coal Co.*, Holding Co. Act Release No. 21,537, 19 S.E.C. Docket 1309 (Apr. 25, 1980), approved additional OPCO investment in SOCCO to finance capital improvements expected to reduce the cost of coal to SOCCO's buyers. As in the previous decisions, the last order adverted briefly to the contractual relation between the associates: "The price at which [SOCCO's] coal will be sold to AEP system companies will not exceed the cost thereof to the seller. For this purpose, cost will include reasonable compensation for necessary capital." *Id.* The SEC cited sections 6, 7, 9, 10, and 12 of PUHCA, 15 U.S.C. §§ 79f, 79g, 79i, 79j, 79*l*, as authority for its various orders. None of the orders cite section 13(b) as authority.

C. *The Decision Below*

The present dispute arose in a rate proceeding initiated in 1982. All issues settled except the extent to which OPCO could include its costs for "captive coal" purchased from SOCCO in its recoverable cost of service. *Ohio Power Co.*, 39 F.E.R.C. ¶ 61,098, at 61,274 (1987). The Administrative Law Judge (ALJ) determined that section 318 and FERC's own regulations did not bar FERC's examination of the reasonableness of OPCO's

captive coal purchases and that OPCO's coal costs had not been shown to be unreasonable. *Id.* at 61,275. The full Commission affirmed the ALJ's determination that the reasonableness of OPCO's captive coal costs were subject to review but determined that the price of the captive coal unreasonably exceeded a comparable market price. *Id.*

On the threshold section 318 issue, the ALJ had reasoned that the SEC's regulation of the "intra-corporate price of [captive] coal" was not the "same subject matter," in the section 318 sense, as FERC's regulation of utility rates. *Id.* at 61,276. FERC agreed for two reasons. First, FERC questioned whether the SEC had set the price of captive coal at cost, since it was "not clear" that the SEC statements regarding whether the price would be "based on" and "not exceed" cost had mandated a cost floor as well as ceiling. *Id.* FERC also cited the SEC's Rule 92, 17 C.F.R. § 250.92, prohibition of inter-associate sales of goods "at a price which exceeds the price at which the purchasers might reasonably be expected to obtain comparable goods elsewhere," which FERC interpreted as indicating that the SEC might require a below-cost market price, *id.*, and SEC authority for above-cost market prices, *id.* at 61,290 n.17. FERC indicated that OPCO might apply this authority to the SEC for a market-based section 13 price.

Second, FERC reasoned that setting the inter-associate price, assuming the SEC had in fact done that, simply was not "the same subject matter," in the section 318 sense, as setting wholesale utility rates and determining what costs may be recovered therein. *Id.* at 61,276-77. FERC cited in support SEC staff disclaimers that SEC section 13(b) orders set rates and an SEC section 13(b) exemption decision that purportedly recognized FERC's rate-making power to allow utilities within its jurisdiction to recover either SEC-authorized costs "or some other amount." *Id.* at 61,277 (quoting *New England Electric*

System, Holding Co. Act Release No. 22,309, 24 S.E.C. Docket 298, 307-08 (Dec. 9, 1981)).

The SEC has not appeared in this cause.

II. Analysis

A. *Statutory Interpretation*

Before undertaking our analysis of FERC's interpretation of section 318, we note that FERC does not claim for its interpretation the deference to administrative agencies mandated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), nor is such deference warranted. While *Chevron* requires us to defer to "an agency's construction of the statute which it administers," *id.* at 842, 104 S.Ct. at 2781, "when an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is entitled to no deference," *Department of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988). Section 318 cannot be said to be entrusted to FERC's administration. Certainly it involves FERC, but only to the extent of FERC's interface with regulation of the regulated entities by the SEC under PUHCA. Therefore, FERC has rightly claimed no deference for its interpretation, and we afford none.

FERC's statutory interpretation rested on two rationales: (1) that there is no conflict between the approaches of the SEC and FERC and (2) that the same subject matter is not involved. We discuss these in the order of their acknowledged importance.

1. The Subject Matter Involved

FERC primarily relied on its determination that its decision and the SEC's decisions do not deal with "the same subject matter" because FERC is regulating rates whereas the SEC is regulating inter-associate transactions. Section 318 governs conflicts regarding "the issue, sale, or guaranty of a security, or assumption of obliga-

tion or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." 16 U.S.C. § 825q. FERC suggests in this Court that the present subject is somehow not a subject within the contemplation of section 318 because Congress enumerated certain matters in section 318 with respect to which the SEC has jurisdiction under PUHCA, *see* 15 U.S.C. §§ 79f-79g, 79i-79j, 79n-79*o*, but did not mention the non-enumerated subject under discussion.

We cannot accept this suggestion. Congress concluded its enumeration in section 318 with the phrase "or any other subject matter," and the inclusiveness of these words cannot be avoided, as FERC would have us do, by speculating that "Congress simply wanted to include a provision that would cover some unanticipated 'conflict' that might arise." Brief for Respondent at 21 n.21. The price term of sales contracts between associated companies are subject to SEC jurisdiction under PUHCA, just as are the enumerated subjects, and are therefore a "subject matter" under section 318 if such price term is also subject to the requirements of the FPA or of FERC's rules, regulations or orders thereunder. 16 U.S.C. § 825q. FERC has in effect set by order a different price term for such a contract by determining that it will not allow the contract price as a cost in OPCO's rate case. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 971, 106 S.Ct. 2349, 2359, 90 L.Ed.2d 943 (1986). The conclusion that the same subject matter is implicated is inescapable. Nor can we subscribe to FERC's analysis that the same subject matter is not involved because it sets rates and the SEC does not. Simply put, FERC's reasoning proves too much because under such an analysis there could never be a conflict between the SEC and FERC with respect to a matter not specifically enumerated in section 318. The absence of conflict would not be *malum in se*, of course, but we presume Congress contemplated that in fact it had con-

ferred on the SEC jurisdiction over some non-enumerated matters that otherwise would fall within the jurisdiction of FERC, and it therefore included the residuary phrase in section 318 to govern those conflicts. FERC's reading renders the residuary language of section 318 meaningless to that extent, and such constructions are disfavored. *See, e.g., National Ass'n of Recycling Indus. v. ICC*, 660 F.2d 795, 799 (D.C. Cir. 1981). In addition, we note that the Supreme Court has held in an analogous situation that a state's "undoubted jurisdiction over retail rates" does not empower it to redetermine issues underlying FERC-set wholesale rates. *Nantahala Power & Light*, 476 U.S. at 970, 106 S.Ct. at 2358.

Moreover, the purposes for which the SEC is to exercise jurisdiction are not as limited as FERC describes them. The ALJ, whose reasoning was affirmed by FERC, 39 F.E.R.C. at 61,275, described the SEC's purposes as ensuring "that no one of the associated companies takes advantage of any other," *Ohio Power Co.*, 25 F.E.R.C. ¶ 63,060, at 65,183 (1983), and "keeping a reasonable arm's length relationship between the two associated companies." *Id.*

These are true statements as far as they go, but they disregard the SEC's statutory charge to exercise its power in the interest of consumers, as well as of investors and the public, and "to insure that such contracts are performed *economically and efficiently*," as well as "at cost." 15 U.S.C. § 79m(b) (emphasis added). Whether and how well the SEC has discharged the full scope of its statutory duties was not before FERC and is not before us. It is sufficient for present purposes that the SEC is charged by the statute with regulating the terms of affiliate contracts in the interest of consumers, as well as investors and the public, and has not exempted the instant contract. Moreover, we observe, such purposes as the ALJ imputed to the SEC are barely distinguishable, if at all, from considerations cited by FERC itself in favor of a market test: "protection from the prospect of self dealing," and "a substitute for . . . arms-length

negotiations." 39 F.E.R.C. at 61,279. The "economic efficiency" FERC seeks to promote by the market test, *id.*, echoes the "economically and efficiently" language of section 13(b) itself. The market and at-cost tests thus seem simply different means to the same end. When Congress enacted PUHCA, however, it specified a particular means to that end for companies subject to PUHCA, and neither we nor FERC are empowered to overrule that express legislative choice for companies within the jurisdiction of the SEC.

We are not persuaded otherwise by the ambiguous disclaimers of rate-setting authority by the SEC and its staff quoted by FERC in its opinion. *See* 39 F.E.R.C at 61,277-78. The SEC clarifies nothing we need to understand by disclaiming "ratemaking" authority: plainly, that is not its statutory mandate nor the issue here. The issue is the effect to be given in a ratemaking proceeding to the SEC's price-term regulation. The statement of the SEC staff has little weight, but we note it asserts that the SEC *does* fix a pricing formula and refers to the intermediate steps between its decision and ratemaking in a manner that suggests that the SEC's staff believes that FERC is free to set rates based on *other* considerations. 39 F.E.R.C. at 61,277. *Cf. Nantahala Power & Light*, 476 U.S. at 967-68, 106 S.Ct. at 2357-58. The SEC staff also stated that FERC " 'has jurisdiction to try issues, both of fact and of interpretation, in applying such orders, insofar as material, to a particular rate case,' " 39 F.E.R.C. at 61,277,[3] but that too is not dispositive of the present question because it does not speak —by its own terms, could not speak—to what considerations govern the effect FERC is to give the SEC's determination.

The purported disclaimer by the SEC itself similarly fails to speak clearly, if at all, to the question before

[3] Quoting "Comment of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206, dated July 31, 1978."

FERC and before us. In *New England Electric System*, Holding Co. Act Release No. 22,309, 24 S.E.C. Docket 298 (Dec. 9, 1981), the SEC had before it New England Power Company's (NEPCO) application for a section 13(b) exemption for the proposed future charter of a collier then under construction. In the paragraphs quoted by FERC, 39 F.E.R.C. at 61,277-78, the SEC determined that it could not then assess whether the complex pricing provisions of the future, twenty-five year charter would conform with section 13(b)'s at-cost requirements On the other hand, the SEC decided that it would not retain jurisdiction because "other regulatory effects . . . allay our concern." 24 S.E.C. Docket at 307. Specifically, the SEC referred to FERC's FPA jurisdiction: "The rates allowed to NEPCO include, as a cost of service, its cost of fuel, which as allowed to NEPCO may include either the entire cost of transportation under the joint venture's charter to NEPCO, if FERC should determine that it is just and reasonable, or some other amount." *Id.* at 308. Because the case clearly is an exemption case, however, it is unclear whether the SEC was stating (1) its understanding that SEC at-cost determinations are irrelevant to FERC rate-seting determinations or (2) the effects that would follow upon its granting of the exemption and the consequent lifting of whatever bar section 318 might otherwise impose. Because an exemption by the SEC lifts the bar of section 318 to action by FERC, 16 U.S.C. § 825q, we are not persuaded that the decision supports the proposition that FERC may use "some other amount" when the SEC does not grant exemption from the cost standard.

The clearest statement by anyone associated with the SEC on the effect, in the absence of an exemption, of SEC section 13(b) determinations on FERC rate determinations that has been brought to our attention is the prepared statement of the SEC submitted to a congressional committee contemplating amendment of PUHCA. The statement, which advocated repeal of PUHCA, referred to FERC's adoption of a market test for affiliate

contracts, the SEC's understanding that section 13 requires a cost standard for such transactions, and the SEC's conclusion that therefore a different federal standard applied to those companies associated with public utility holding companies than applied to those not so associated. *The Public Utility Holding Company Act of 1935: Hearings on H.R. 5220, H.R. 5465 and H.R. 6134 before the Subcommittee on Energy Conservation and Power of the Committee on Energy and Commerce, House of Representatives*, 97th Cong., 2d Sess., at 582-83 (1982). (The SEC's recommendation to repeal PUHCA, of course, was not enacted.)

Finally in this respect, we note that FERC properly has abandoned in this Court its citation below, 39 F.E.R.C. ¶ 61,098, at 61,290 n.18 & accompanying text at 61,277, of *Mississippi Indus. v. F.E.R.C.*, 808 F.2d 1525, 1550-51 (D.C. Cir. 1987) (per curiam), as authority for its jurisdiction in the present case. The contracts at issue there were characterized as contracts for the sale of electricity between associated companies and therefore outside the scope of the SEC's jurisdiction. *See id.; compare* 15 U.S.C. § 79m(b) *with* 15 U.S.C. § 79b (a)(20).

2. The existence of Conflict

FERC's first-stated, but less important, rationale was that no jurisdictional conflict arises because the SEC *may* require market pricing and "it is not clear," 39 F.E.R.C. at 61,276, that the SEC's orders in the present case impose a cost floor as well as a cost ceiling. As to the first contention, FERC cites the SEC's Rule 92, which provides that the price for seller-produced goods between associated companies may not exceed "the price at which the purchase might reasonably be expected to obtain comparable goods elsewhere." 17 C.F.R. § 250.92. As to the second, FERC's opinion notes that the SEC orders never state that SOCCO's price must equal cost, only that it will be "based on" and "not exceed" cost. In

this Court, FERC points additionally to the boiler-plate character of the language in the SEC orders regarding the interest of the public, investors, and consumers; to the absence of any findings by the SEC on the reasonableness of the SOCCO-OPCO charges; to the absence of any findings that the coal price should be passed through to rate payers; and to the absence of evidence that the SEC was "closely monitoring" all costs to ensure efficiency.

We cannot accept this rationale either because it proceeds from a false premise that the bar of section 318 applies only when there is a present conflict between SEC and FERC prescriptions. The language of section 318 in fact bars FERC jurisdiction whenever a person is "subject . . . to a requirement," 16 U.S.C. § 825q, of PUHCA. OPCO plainly is so subject to section 13(b) with respect to its contractual relations with SOCCO. The fact that FERC's market approach produces a current result that does "not exceed" cost, in the words of the SEC's 1978 and 1980 orders, does not make OPCO any less subject to section 13(b) or to the SEC's orders. In the absence of exemption, it is for the SEC rather than FERC to determine the inter-associate price.

FERC suggests that OPCO may apply to the SEC for approval of a market-based rate. 39 F.E.R.C. at 61,290 n.17. The suggestion is not well-taken because it reverses Congress's section 318 decision that the SEC has the right of first refusal, as it were, in making such determinations. The statutory scheme simply does not contemplate that FERC will make the determination and then send the subject company to the SEC for a conforming order.

Although it does not affect our decision, we must agree with FERC that it *is* "not clear" from the orders in question that the SEC was particularly mindful of its statutory powers and obligations under section 13(b). The SEC orders devoted some attention to the cost of capital to SOCCO and to the cost of coal to that extent.

But it is only to that extent that any concern with the cost of coal is evident. None of the four orders cites section 13, nor mentions expressly whatever purchase agreement exists between SOCCO and OPCO, nor describes any element of costs other than the cost of capital. We note that section 13(b) and the SEC's regulations thereunder do not appear to require submission of and approval of inter-associate agreements but only conformity of the same with the SEC-promulgated rules. Accordingly, OPCO's assertion that the SEC "approved" the sales agreement between OPCO and SOCCO is problematic, and the references in the orders are consistent with, and may be no more than, references in passing to SOCCO's apparent election of, and unexamined representations of conformity with, the Rule 91 at-cost method. We also note, however, that Rules 90 and 91 are regulations under section 13(b) and as binding thereunder as an individualized order. We note as well that the SEC's 1978 Order *did* require OPCO to submit quarterly reports on the price of coal and how the price was computed. All these matters taken into account, our decision nevertheless rests on the threshold matter of the language of the statute, which commits the determination of the inter-associate price to the SEC. Whether the SEC acquaints itself well or ill is not our present concern.

B. *Trapped Costs*

Although based upon the language of the statute, our decision is also informed by consideration of the consequences of FERC's action in effectively prescribing an inter-associate price. Accordingly, our decision is buttressed by the consistency of its consequences with Supreme Court precedents that disfavor conflicting regulation resulting in trapped costs. In *Nantahala Power & Light*, the Supreme Court held that it was impermissible for a retail-rate-setting state utility commission to "trap" costs by making a different allocation between related companies of a fixed quantity of low-cost power than had

FERC at the wholesale level. 476 U.S. at 970-71, 106 S.Ct. at 2358-59. (The PUHCA was not involved.) In a passage that is particularly instructive, the Court indicated that

> FERC's failure actually to reform the AA [the agreement between the related companies] does not materially alter [the] analysis. FERC ordered Nantahala to adjust its wholesale rates so that its average cost per unit of power reflected an allocation of [low-cost] entitlements power different from the allocation set forth in the AA. The effect of that order is, for purposes of this case, essentially the same as reformation of the agreement itself. . . . By adopting a different allocation, NCUC [the state agency] imputes to Nantahala a different average cost of power, notwithstanding the fact that, under the AA, Nantahala unquestionably is not entitled to demand that [allocation]. Consequently, Nantahala is exposed to "trapped" costs. It must, under NCUC's order, pretend that it is paying less for the power it receives from TVA, under agreements not subject to NCUC's jurisdiction, than is in fact the case.

Id. at 971, 106 S.Ct. at 2359. Although the parallels to the present case are not precise, there are two quite clear lessons in the passage: First, it is sufficient that FERC's action in the present case reforms the agreement between OPCO and SOCCO in effect rather than in fact. Second, the cost-trapping "pretense" occasioned thereby is prohibited. In the case of *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, —— U.S ——, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988), FERC had allocated responsibility for purchasing the expensive power generated by the Middle South Utilities system's Grand Gulf 1 nuclear power plant among the system's multiple operating companies on a certain basis. The State of Mississippi, however, claimed the power to disregard FERC's deter-

mination with respect to the operating company within its jurisdiction because FERC had not actually considered the prudence of building Grand Gulf and therefore had not preempted Mississippi's power to do so. The Supreme Court held that *Nantahala Power & Light* controlled and preemption did *not* turn on whether the particular matter of prudence was actually decided by FERC. 108 S.Ct. at 2438-42.

Given the clear and express statutory allocation of jurisdiction between federal agencies in section 318, *Nantahala Power & Light* and *Mississippi Power & Light* are not distinguishable from the present circumstances simply because they involved state-federal relations or because FERC must be re-cast in the role of the respective states with the SEC taking the role formerly played by FERC. As FERC points out, however, the Court did not rule in either *Nantahala Power & Light* or *Mississippi Power & Light* on the authority of a state (and by analogy, FERC in the present circumstances) to second-guess the utility on the *quantity* of price-regulated power it should have purchased when cheaper power was available. 476 U.S. at 972, 106 S.Ct. at 2359; 108 S.Ct. at 2440. That question has been answered favorably to a state (and, by analogy, favorably to FERC in the present circumstances) in *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 606-11 (3d Cir.1988). We have no occasion to consider this rationale, however. It plainly was not part of FERC's analysis below, and an agency's order must be affirmed on the basis stated in its opinion or not at all. *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141 (1974).

FERC also argues that there is no "trapping" because FERC has stated that it will allow OPCO to recover in its rates, when the facts warrant, a fair market value for its captive coal in excess of its costs therefor. *See Public Serv. Co. of N.M.*, 17 F.E.R.C. ¶ 61,123 (1981) (Opinion No. 133), *aff'd in pertinent part sub nom.*

Pub. Serv. Co. of N.M. v. *FERC*, 832 F.2d 1201 (10th Cir. 1987) (non-SEC case). The difficulty with this element of FERC's argument—and indeed with its present attempt to impose a market-based approach on petitioner's transactions—is that FERC does not, and apparently cannot, explain how OPCO can recover in its rates such a fair market value in excess of cost without running afoul of the SEC's bar in 17 C.F.R. § 250.90(a)(2). *See supra* p. 4. In other words, if we adopt FERC's approach, OPCO faces a tails-we-lose situation when FERC finds that fair market value dictates a captive coal level cost but is prevented by SEC regulation from winning when the other side of the coin comes up. Therefore, attractive as FERC's market approach may be in general, its application to the PUHCA-regulated petitioner adds nothing to FERC's argument in the present case.

III. Conclusion

For the reasons given above, we vacate and remand the decision of FERC. We would like to clarify that there are two issues which we do not address. First, we do not hold that OPCO and SOCCO or any other SEC-regulated companies are entitled to pay and receive a price in excess of market. *See* 17 C.F.R. § 250.92. Second, we do not hold that FERC may not apply a market test to contracts between related companies that are subject to its jurisdiction but not that of the SEC. *See Public Serv. Co. of N.M.*, 832 F.2d at 1201. We hold only that the statute commits to the SEC such determinations regarding companies associated with a public utility holding company. Basing our decision as we do on this threshold issue, we have no occasion to reach the further issues raised by the petition.

Granted.

MIKVA, Circuit Judge, concurring:

I fully agree with my colleagues that the Federal Energy Regulatory Commission ("FERC") may not escape the strictures of section 318 of the Federal Power Act ("FPA"), 16 U.S.C. § 825q, simply by claiming that it and the Securities and Exchange Commission ("SEC") are not regulating "the same subject matter," for it is clear that both agencies have ruled on the price of coal between Ohio Power Company ("Ohio Power") and its subsidiary, Southern Ohio Coal Company ("Southern Ohio"). *See* Majority Opinion ("Maj. Op.") at 1405-1408.

In my view, however, for section 318 to divest FERC of jurisdiction, a person must also be subject to *conflicting* requirements of the Public Utility Holding Company Act ("PUHCA"), 15 U.S.C. §§ 79, *et seq.*, and the FPA. I base this conclusion not only on the text of the statute, but also because section 13 would otherwise serve no purpose. Applying this interpretation to the case *sub judice*, I am not convinced that the SEC's orders (under the PUHCA) and FERC's decision (under the FPA) are in conflict. Accordingly, I would uphold FERC's determination that section 318 does not bar its jurisdiction in this case.

I concur in the judgment of my colleagues, however, and would grant the petition for review, on the alternate ground that FERC's decision is contrary to section 35.14(a)(7) of its own regulations, 18 C.F.R. § 35.14(a)(7).

I.

Section 318 of the FPA provides in relevant part:

> If, with respect to the issue, sale, or guaranty of a security, * * * or the acquisition or disposition of any security, capital assets, facilities, or *any other subject matter*, any person is *subject both to a requirement* of the Public Utility Holding Company Act of 1935 * * * *and to a requirement* of this chap-

> ter * * *, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this chapter * * * *with respect to the same subject matter*, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this chapter shall apply to such person.

16 U.S.C. § 825q (emphasis added). As I parse this provision, there is a jurisdictional conflict (and FERC must yield jurisdiction to the SEC) if, and only if, a person is subject to a conflicting "requirement" of both PUHCA and the FPA, and the requirements are "with respect to the same subject matter." The first condition is a logical necessity, for even if there is dual jurisdiction over "the same subject matter" (the second condition), if there is no conflict, then there is no need for FERC to yield to the SEC.

As noted above, I agree with my colleagues that the second condition has been met in this case: FERC and the SEC are clearly regulating the same subject matter, namely, the price of coal between Ohio Power and Southern Ohio. I am not so sure, however, that there is a conflict between the relevant SEC orders and FERC's decision below.

In 1971, the SEC (pursuant to the PUHCA) authorized the formation of Southern Ohio on the condition, *inter alia*, that "[t]he charges for coal by Southern Ohio will be *based on an amount equal to the actual cost* of Southern Ohio in developing the reserve and mining such coal, * * *." Ohio Power Co., Release No. 17,383, at 2 (Dec. 2, 1971) (SEC) (emphasis added). In its 1978 order approving the transfer of certain mine and other coal properties from Ohio Power to Southern Ohio, the SEC further stated that "[t]he price at which SOhio coal is sold to AEP System companies *will not exceed the cost thereof* to the seller." Ohio Power Co., Release No. 20,515,

14 SEC Docket 928, 929 (Apr. 24, 1978) (emphasis added).

In the decision below, FERC (pursuant to the FPA) ruled that, based on the market price for comparable coal, the price Ohio Power paid for Southern Ohio coal was unreasonably high; FERC therefore disallowed Ohio Power's request for a rate increase based on those costs. 39 FERC ¶ 61,098, at 61,285-86 (1987), *reh'g denied*, 43 FERC ¶ 61,046 (1988).

In this petition, Ohio Power maintains that there is a jurisdictional conflict by arguing (and, incidentally, implicitly conceding that section 318 requires a conflict) that section 13(b) of the PUHCA, 15 U.S.C. § 79m(b), mandates a cost standard and that, in any event, the SEC in this case required Southern Ohio to set its price at cost. I disagree.

Although section 13(b) includes the phrase "at cost," Congress intended section 13(b) to avoid "*excessive* charges" resulting from the lack of arm's-length bargaining and open competition between public utility holding companies and their subsidiaries. PUHCA § 1(b)(2) (emphasis added), 15 U.S.C. § 79a(b)(2); *see also North American Co. v. SEC*, 327 U.S. 686, 701 & n.11, 66 S.Ct. 785, 794 & n.11, 90 L.Ed. 945 (1946) (citing congressional findings underlying section 1(b)). The SEC has interpreted section 13(b) to mean that "[n]o subsidiary company of a registered holding company * * * shall perform any service or construction for, or sell any goods to, any associate company therefore, or enter into any contract to do so, at *more than cost* * * *." 17 C.F.R. § 250.90(a)(2) (emphasis added). Indeed, the SEC even permits a market-price test for the sale of goods between such affiliates. *See* 17 C.F.R. § 250.92(b). I cannot conclude that section 13(b) necessarily mandates strict at-cost pricing between public utility holding companies and their associates.

Ohio Power also argues that, in any event, the SEC did not authorize a market approach in this case. But

this argument is misplaced, for the issue is whether there is a conflict in requirements under the two statutes. Because the SEC in 1978 limited the price of coal only to *cost as a ceiling*, *see* Ohio Power Co., Release No. 20515, 14 SEC Docket 928, 929 (Apr. 24, 1978), I find no conflict between that requirement and FERC's requirement that Ohio Power pay market price, where, as in this case, the market price is less than cost. The SEC's 1971 order is not to the contrary, for it requires only that the price be "based on" cost; the later order imposing cost as a ceiling is certainly "based on" cost.

Moreover, as my colleagues note, *see* Maj. Op. at 1408-09, the SEC's approval of the various transactions was grounded on the financial aspects of the corporate arrangements, not on the reasonableness of the price paid for the coal. Ohio Power therefore reads too much into the SEC orders when it claims that the SEC expressly conditioned its approval of the affiliate arrangement on a strict cost-based standard—Ohio Power relies too heavily on what seems to be merely boilerplate language. Accordingly, because I read the SEC's orders to permit Ohio Power to pay less than cost for the coal, FERC's imposition of a market price less than cost does not in this case create a jurisdictional conflict. As FERC stated below: "it is not clear that the SEC requires Ohio Power to purchase coal from its subsidiary at cost, rather than at market price. The SEC orders which Ohio Power cites for this proposition * * * do not appear to mandate the cost-based price where a market price would be lower, rather they permit a price up to a cost-based price." 39 FERC at 61,276.

In short, although Ohio Power has met the second condition of section 318 (both agencies are regulating the "same subject matter," namely, the reasonableness of the price paid), it has not met the first. Under the facts of this case, the SEC has not precluded a price *less than* cost; FERC's setting of the allowable price at a market price less than cost therefore does not create a conflict that would bring section 318 into play.

I note in passing that, under my view, if FERC had sought to impose a price *higher than* cost (i.e., if the market price determined by FERC were higher than cost), then FERC's requirement would clearly conflict with the SEC's requirement and, under section 318, FERC would have to abide by the SEC's determination. This implies that, in a case where the SEC has set cost as a ceiling, FERC has jurisdiction to impose a market price only if that price is less than cost. FERC in dictum below, however, would have permitted Ohio Power to recover the market price even if that price exceeded cost. *See* 39 FERC at 61,287-88. Although this is a problematic aspect of the decision below, we need not pass on its validity under section 318, for that case is simply not before us today.

II.

Ohio Power argues in the alternative that, even if section 318 does not apply, section 35.14(a)(7) of FERC's own rules bars it from imposing its market-price test. I would agree and grant the petition on this ground.

Section 35.14(a)(7), which governs fuel price adjustment clauses in filed schedules, provides in pertinent part:

> Where a utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, *such cost shall be deemed to be reasonable* and includable in the adjustment clause.

18 C.F.R. § 35.14(a)(7) (emphasis added). There is no dispute that this rule applies to the transaction in this case; the only issue on appeal is the meaning of the word "deemed." FERC, affirming the administrative law judge on this point, found that the regulation creates only a rebuttable presumption of reasonableness. *See* 39 FERC at 61,287-88. Ohio Power challenges this conclusion, ar-

guing that the word "deemed" establishes instead a conclusive presumption.

The applicable standard of review is clear. Although a reviewing court must defer to an agency's interpretation of its own rules, *see Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1503 (D.C. Cir. 1987), no deference is owed an interpretation at odds with the plain meaning of the text, *see Union of Concerned Scientists v. NRC*, 711 F.2d 370, 381 (D.C. Cir. 1983) ("When an agency's interpretation flies in the face of the language of the rules themselves, it is owed no deference.").

Although the provision at issue has apparently not been interpreted in any published opinion, courts construing the word "deemed" have generally found that it establishes a conclusive presumption. *See H.P. Coffee Co. v. Reconstruction Finance Corp.*, 215 F.2d 818, 822 (Emer. Ct. App. 1954) (finding "almost unanimous judicial determination that the word ['deemed'], when employed in statutory law, creates a conclusive presumption") (citing cases); *see also Dameron v. Brodhead*, 345 U.S. 322, 326-27, 73 S.Ct. 721, 723-24, 97 L.Ed. 1041 (1953) (rejecting, in a case involving state taxation of a serviceman's personal property, the argument that "deemed" implies a rebuttable presumption, because such a construction would nullify the statute); *Kyzar v. Califano*, 597 F.2d 68, 71 (5th Cir. 1979) (where statute provided that an insured child is "deemed dependent" upon a stepparent if the child was living with the stepparent at the time of death of the natural parent. Congress intended that dependency would be conclusively established upon proof of the objective criteria); *Kohn v. Myers*, 266 F.2d 353, 357 (2d Cir. 1959) ("The word 'deemed' gives rise to a conclusive presumption or substantive rule of law that the acquisition of assets from a bankrupt after a petition of bankruptcy is filed is not in good faith if the transferee knew the petition was pending and did not have reasonable cause to believe that it was not well founded."). Numerous state court decisions, too many to list here, are in accord.

Moreover, if the intent of the regulation were to create a rebuttable presumption, as FERC now contends, then the rule would be superfluous, for it has long been settled that a utility's costs are presumed (subject to rebuttal) to be prudently incurred. *See Missouri ex rel. Southwestern Bell Telephone Co. v. Missouri Pub. Serv. Comm.*, 262 U.S. 276, 289 n.1, 43 S.Ct. 544, 547 n.1, 67 L.Ed. 981 (1923); *Anaheim v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981).

The history of section 35.14(a)(7) also supports Ohio Power's reading of the provision, for FERC has twice proposed and rejected a different rule to accomplish the result that it now claims flows from the existing rule. First, as originally proposed by the Federal Power Commission ("FPC") in 1973, the regulation did not contain the "deemed" language:

> Where the cost of fuel includes fuel from company owned or controlled sources, that fact shall be noted and described as part of any filing. *Only the reasonable cost of such fuel may be included. Amounts collected from customers in excess of such reasonable cost shall be subject to refund.*

38 Fed. Reg. 17,253 (1973) (emphasis added). Only the unitalicized sentence has been retained in the current regulation. After public comment, the second and third sentences were modified to its current version:

> Where the cost of fuel includes fuel from company-owned or controlled sources, that fact shall be noted and described as part of any filing. *Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed reasonable and includable in the adjustment clause.* * * * Fuel charges which do not appear to be reasonable may result in the suspension of the fuel adjustment clause or cause an investigation

> thereof to be made by the Commission on its own motion under section 206 of the Federal Power Act.

39 Fed. Reg. 28,911 (1974) (emphasis added). When the rule was eventually promulgated, the FPC explained that "[t]he modification provide[s] that when a utility purchases fuel from an owned or controlled source and the price is subject to the jurisdiction of a regulatory body, the cost of the fuel *may be included* in the fuel adjustment clause." 39 Fed. Reg. 40,583 (1974) (emphasis added). The addition of the "deemed" language suggests, albeit weakly, that the prior version, which was rejected and which provided no special treatment for affiliate fuel purchases subject to the jurisdiction of another regulatory body, would have accomplished the result FERC now seeks to impose.

Second, in 1979 FERC proposed to amend section 35.14(a)(7) to require utilities to file, as rate schedules, all contracts for fuel purchases from company-owned or company-controlled sources, regardless of whether the price was subject to the jurisdiction of a regulatory body. *See* 44 Fed. Reg. 28,683 (1979). The stated purpose of this proposal was "to further aid the Commission in fulfilling its responsibility to ensure that utilities are purchasing fuel at reasonable prices and that only allowable costs are being passed through in the fuel cost adjustment clause." *Id.* at 28,684; *see also* 45 Fed. Reg. 82,272 (1980). Although FERC later determined that its adoption of a market-price test for determining the reasonableness of affiliate fuel costs made the proposed revision unnecessary, *see* 50 Fed. Reg. 24,779 (1985), it is significant that FERC's proposal would have been superfluous had the provision already established merely a rebuttable presumption of reasonableness, because there would have been no question that FERC would have had independent jurisdiction to review the contracts.

FERC relies heavily on an interpretation of the section in a 1975 FPC chairman's letter to a Senate Subcommittee, but that letter is not persuasive. The letter

merely states that section 35.14(a)(7) creates "a presumption of reasonableness" without specifying whether the presumption is rebuttable or conclusive. *The Utility Act of 1975: Hearings on S. 594 Before the Subcomm. on Intergovernmental Relations, Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 500, 514 (1975).

Finally, FERC argues that its statutory mandate to ensure that rates are just and reasonable implies that section 35.14(a)(7) cannot be read to foreclose FERC from independently determining the reasonableness of wholesale utility charges. But this argument is valid only if one ignores section 35.14(a)(7). Although, as a general matter, FERC may have the authority to make an independent determination of reasonableness, section 35.14(a)(7) forecloses such a route to the extent that the price is already subject to the jurisdiction of another regulatory body. In other words, section 35.14(a)(7) establishes, as a policy matter, that if another regulatory body has already passed on the fuel price, then FERC will abide by that determination. This reading is entirely consistent with the purpose of section 35.14(a)(7), which is to avoid unreasonable fuel costs between affiliated companies, for if another agency (e.g., the SEC) has already made that determination, then there is no reason for FERC to second-guess that decision.

* * * * *

I concur with my colleagues that the petition for review should be granted, but not on the basis of section 318 of the EPA. I do not find, in this case, a collision between the two agencies operating in this field. Rather, I would find that FERC erroneously constructed section 35.14(a)(7) of its regulations to establish merely a rebuttable presumption of reasonableness. Under the regulation, because the prices of Ohio Power's fuel from its affiliate are subject to the jurisdiction of the SEC, such costs must be conclusively presumed reasonable.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

OHIO MUNICIPALS, INTERVENORS

Before: MIKVA, SILBERMAN and SENTELLE, Circuit Judges

ORDER

[Filed Oct. 12, 1989]

Upon consideration of the Petitions For Rehearing of Respondent Federal Energy Regulatory Commission and Intervenor Ohio Municipals, it is

ORDERED, by the Court, that the petitions are denied.

Per curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Mikva would grant the petitions for rehearing. His statement is attached.

Statement of MIKVA, Circuit Judge

I would grant the petition for rehearing by the panel. I continue to be concerned that the panel opinion creates a regulatory gap that can be mischievous in future cases. As I state in my concurring opinion when the case was originally heard, there is no conflicting requirement imposed by the agencies involved with respect to the same subject matter. Accordingly, the Federal Energy Regulatory Commission (FERC) was not ousted of its jurisdiction over the price of coal charged to Ohio Power Company. The flaw in FERC's decision stems from a fatal conflict with its own regulations, and warrants granting the petition for review, as the panel decision ordained. The statutory interpretation engaged in by the majority, however, generates a no-man's land where neither the Securities and Exchange Commission (SEC) nor FERC will patrol holding company practices which can oppress consumers, investors and the public. Congress did not intend and our court should not construct such a result.

Because the result in the instant petition would not be affected by my interpretation of the relevant statutes, I do not call for a rehearing by our full court. I do continue to express a concern about what I perceive to be a flawed parsing of the statutes involved in this important and delicate area of interagency administration of the law.

APPENDIX E

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. ER82-553-000 and ER82-554-000

OHIO POWER COMPANY

Opinion No. 272; Opinion and Order on Recovery of the Cost of Coal Purchased From an Affiliate

(Issued April 30, 1987)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Initial Decision of the presiding administrative law judge, issued December 14, 1983, appears at 25 FERC ¶ 63,060.]

Appearances

Edward J. Brady, *Marvin I. Resnick*, *Alan Kessler*, and *William E. Olson* for Ohio Power Company

William H. Roberts and *Richard Hitt* for Public Service Commission of West Virginia

Paul Nordstrom, *Glen L. Ortman*, *Kenneth E. Natale*, *Donald R. Allen*, *David P. Yaffe*, and *Gregg D. Ottinger* for the Municipal Wholesale Electric Customers of Ohio Power Company

Phillip Nelson and *O.C. Hall* for Wheeling Electric Company

James D. Kauffelt for Linden Chemicals and Plastic, Inc., Mobay Chemical Corporation, and PPG Industrials, Inc.

Melvin Berger, Arthur Hays Butler, Lawrence R. Greenfield, Michael Small, James E. Rogers, Jr., Marilyn L. Doria, Harvey L. Reiter and *Daniel Watkiss* for the staff of the Federal Energy Regulatory Commission

[Opinion No. 272 Text]

I. Introduction and Summary

On May 28, 1982, the Ohio Power Company (Ohio Power) filed rate increases for its wholesale service to fifteen municipalities in the State of Ohio (Docket No. ER82-553-000) and to its affiliate in West Virginia, the Wheeling Electric Company (Docket No. ER82-554-000). The Commission accepted settlements dealing with all aspects of the proposed rates except what was called the captive coal issue which involves a challenge to the reasonableness of the fuel costs recovered from Ohio Power's wholesale customers for the coal it purchased from the Martinka mine.[1]

The Martinka mine is owned and operated by the Southern Ohio Coal Company, a wholly owned subsidiary of Ohio Power. Ohio Power is owned by the American Electric Power Company (AEP). AEP owns seven other electric utilities that operate as a coordinated system in a seven-state area. AEP is subject to regulation by the Securities and Exchange Commission (SEC) under the Public Utility Holding Company Act of 1935 (PUHCA).[2]

An initial decision on the reasonableness of Ohio Power's coal costs was issued on December 14, 1983.[3] In the initial decision the presiding judge found that:

> (1) section 318 of the Federal Power Act does not preclude the Commission from determining

---

[1] *See Ohio Power Company*, 23 FERC ¶ 61,236 (1983) and 24 FERC ¶ 61,017 (1983).

[2] 15 U.S.C. § 79a (1982).

[3] 25 FERC ¶ 63,060 (1983).

whether it is just and reasonable for Ohio Power to recover the full cost of its purchases from the Martinka mine from its wholesale ratepayers;

(2) the Commission's fuel adjustment clause regulation [4] creates only a presumption which does not preclude the Commission from considering the reasonableness of Ohio Power's fuel costs;

(3) Ohio Power's coal costs are subject to a comparable market price test as adopted in Opinion No. 133 [5] to determine the reasonableness of those costs; and

(4) the comparable market price evidence presented to show that Ohio Power's costs were not reasonable was not credible.

The judge concluded that the prices paid by Ohio Power for Martinka coal were reasonable.

Briefs on exceptions to the initial decision and briefs opposing exceptions were filed by Ohio Power, Commission trial staff (staff), and the Municipal Wholesale Electric Consumers of Ohio Power (the municipals).[6]

Ohio Power excepts to the judge's ruling on the preemptive effect of section 318 of the Federal Power Act and section 35.14(a)(7) of the Commission's regulations on the Commission's review of Ohio Power's coal costs. Ohio Power argues that the Commission can change its regulations only prospectively. Ohio Power also objects

---

[4] 18 C.F.R. § 35.14(a)(7) (1986).

[5] *Public Service Company of New Mexico (New Mexico)*, 17 FERC ¶ 61,123 (1981), *appeal pending sub nom. Public Service Company of New Mexico v. F.E.R.C.*, Nos. 82-1148, 84-1624 and 84-1677 (10th Cir., filed Feb. 3, 1982).

[6] On May 15, 1986, New England Power Company (NEP) filed a motion with the Commission for permission to file an *amicus curiae* brief in this proceeding; our staff, the municipals, the Town of Norwood, Massachusetts, the Attorney General of Rhode Island, and the Rhode Island Division of Public Utilities and Carriers oppose NEP's motion. Because of the lateness of the filing without good cause the Commission shall deny the motion.

to the imposition of a comparable market price test on a utility subject to PUHCA asserting that the result would be a lower of cost or market price test, a result which Ohio Power asserts would be confiscatory. Ohio Power further urges that as a factual matter Ohio Power's ownership of affiliate mines serves the purpose of delivering the lowest priced electricity possible. Staff and the municipals except to the judge's rejection of staff's evidence as a reliable determinant of comparable market prices.

We affirm the judge's rulings and reasoning regarding the Commission's authority, pursuant to the Federal Power Act and our regulations, to determine the reasonableness of coal costs Ohio Power recovers from its wholesale customers. We disagree, however, with the judge's finding that those costs were reasonable. We find the costs Ohio Power has recovered for its purchases of Martinka coal are unreasonable when compared with market prices and that Ohio Power therefore must refund amounts collected since the effective date of the rates in this proceeding that exceed the comparable market price.

II. Discussion

A. Commission Jurisdiction to Review Ohio Power's Coal Costs

1. Section 318 of the Federal Power Act

Ohio Power urges that under PUHCA and section 318 of the Federal Power Act, the SEC has exclusive jurisdiction over the pricing of the affiliate Martinka coal.[7] The presiding judge concluded that section 318 of the Federal Power Act[8] does not preclude this Commission from determining whether it is just and reasonable for Ohio Power to recover from its wholesale customers, in

---

[7] Ohio Power brief on exceptions at 17-36.

[8] 16 U.S.C. § 825q (1982).

its rates, the full cost of its purchases from the Martinka mine.[9]

The source of the SEC's authority to regulate the price at which Ohio Power purchases coal from its subsidiary is section 13 of PUHCA.[10] Ohio Power contends that section 13(b) of PUHCA mandates that it purchase coal from its subsidiary at cost.[11] Ohio Power contends that if the Commission orders that Ohio Power may recover in rates only a market-based amount for the Martinka coal, that Ohio Power will face conflicting regulation by the SEC and the Commission which is prohibited by section 318 of the Federal Power Act. Section 318 provides:

> If, with respect to the issue, sale, or guaranty of a *security . . . , or any other subject matter*, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 . . . and to a requirement of this Act . . . the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this Act . . . *with respect to the same subject matter*, unless the Securi-

---

[9] 25 FERC at p. 65,183.

[10] 15 U.S.C. § 79m (1982).

[11] The relevant portions of section 13(b) of PUHCA, 15 U.S.C. § 79m(b) (1982), provide:

> [I]t shall be unlawful for any subsidiary company of any registered holding company or for any mutual service company . . . to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the [Securities and Exchange] Commission by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies.

> ties and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this Act shall apply to such person. (Emphasis supplied.)

The judge concluded that, assuming the SEC set the price at which Ohio Power may purchase its subsidiary's coal, there was no conflict of jurisdiction because the SEC regulates the intra-corporate price of coal between Ohio Power and its subsidiary, while this Commission sets rates.[12] The judge concluded that the same subject matter is not subject to the requirements of both PUHCA and the Federal Power Act.[13] We agree with the judge.

First, it is not clear that the SEC requires Ohio Power to purchase coal from its subsidiary at cost, rather than at market price. The SEC orders which Ohio Power cites for this proposition state that the charges for the coal "will be based on actual cost," [14] and "will not exceed the cost thereof to seller." [15] These orders authorized financing for the coal mining subsidiary. They do not appear to mandate the cost-based price where a market price would be lower, rather they permit a price up to a cost-based price.

The SEC's Rule 92 implements in part section 13 of PUHCA. The rule prohibits a subsidiary of a registered holding company from selling

> any goods produced by it to any associate company thereof, or enter into any contract to do so, at a price which exceeds the price at which the purchasers might reasonably be expected to obtain comparable goods elsewhere, or to finish them itself, giving due regard to quality, quantity, regularity of supply,

---

[12] 25 FERC at p. 65,183.

[13] *Id.*

[14] SEC 1935 Act Release No. 17383, Dec. 2, 1971.

[15] SEC 1935 Act Release No. 21537, April 25, 1980.

and other factors entering into the calculation of a fair price.[16]

Thus it appears that not only does the SEC not require a cost-based price for the subsidiary coal, the SEC may require a market-based price for subsidiary coal if the market price is lower than cost.[17]

More importantly, assuming that the SEC has actually affirmatively set the price which Ohio Power must pay its subsidiary for the Martinka coal, setting the intra-corporate price and setting rates are not the same subject matter which would bring section 318 into play. We have taken full account of the fact that the SEC has jurisdiction, under PUHCA, to regulate the price of coal purchased by Ohio Power from the Martinka mine. The SEC's jurisdiction, however, does not extend to setting rates and determining what fuel costs Ohio Power may collect from its wholesale customers. There is thus no conflict in the regulation by the SEC and the regulation by this Commission.[18]

---

[16] 17 C.F.R. § 250.92 (1986).

[17] The SEC can, pursuant to section 13(b), authorize a market-based price for a transaction between a subsidiary and parent even when that market-based price exceeds cost. *See*, New England Electric System, 1935 Act Release No. 22309, 24 SEC Docket (1981), where the SEC, pursuant to the provisions of section 13(b), exempted a contract from the cost limitation of 13(b) so that a market-based approach could be used. Thus Ohio Power could apply to the SEC for approval of a market-based pricing mechanism for its affiliate coal if it so desired. *See also*, "Comment of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206 dated July 31, 1978" filed in Docket No. E-9206, on October 27, 1978, at 3. Therefore as a factual matter, it does not appear that Ohio Power is accurate in stating that a company subject to SEC jurisdiction pursuant to PUHCA is required always to sell its products to an affiliate at cost-based prices.

[18] *See Mississippi Industries v. F.E.R.C.*, 808 F.2d 1525, 1550-51 (D.C. Cir. 1987). Appalachian Power Company, another AEP owned

The SEC's Division of Corporate Regulation submitted comments in another Commission case involving AEP affiliate coal purchases in which staff of the SEC explained its view of the effect of SEC orders approving the financing of coal mining subsidiaries under PUHCA.[19] These comments demonstrate that the SEC recognizes that it does not set rates:

> The orders of the SEC under the 1935 Act do not set rates for operating utility companies. There is no conflict with FERC jurisdiction. In setting rates, FERC is legally bound to give due consideration to cost of service, which certainly includes cost of fuel burned, but there are a number of intermediary steps between our order authorizing an affiliate to acquire and mine coal reserves and the rate determination . . . .
>
> The SEC pricing orders are final orders directed, in conjunction with the 1935 Act and the pertinent rules, to fixing a pricing formula until further order of the Commission. It is the rate making authority, not the SEC, that has jurisdiction to try issues, both of fact and of interpretation, in applying such orders, insofar as material, to a particular rate case.

---

utility, raised the same contention regarding SEC regulation in *McDowell County Consumers Council, Inc. v. American Electric Power (McDowell County)*, Docket No. E-9206. The Commission, in setting AEP's coal purchasing practices for investigation, responded that its investigation was "instituted for the purpose of fulfilling this Commission's statutory obligation as expressed in Sections 202, 205, 206, 301, 306, 307 and 309 of the Federal Power Act which are in no way repugnant to the exercise of any authority which the SEC may choose to assert under its statute." *See* 54 FPC 361, 363 (1975).

[19] "Comment of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206, dated July 31, 1978."

Moreover, the SEC itself, as opposed to its staff, has recognized that its regulation of fuel-related costs, pursuant to section 13(b), is not in conflict with and does not preclude this Commission setting rates. In *New England Electric System* the SEC authorized a joint venture in which a registered holding company and two of its subsidiaries would participate in building a coal-fired collier. The SEC, pursuant to section 13(b), exempted the transaction from the cost limitations of 13(b), so that the transportation approved by the SEC was at a market-based price which was expected to exceed cost. The SEC commented on the relationship of its regulation under section 13(b) of PUHCA and this Commission's rate regulation:

> We cannot assess now, when the vessel is under construction, the extent to which the price to be determined under the charter will exceed cost under Section 13(b). Nor are we inclined to reserve jurisdiction over the adjustments and redefinitions under the charter as they develop over the next quarter century. The charter with NEPCO has other regulatory effects, not under the Act we administer, that in this case better serve the purposes and allay our concern.
>
> NEPCO is engaged in the production, transmission and sale, at wholesale, of electric energy, essentially to the utility associate companies in the NEES system. It is a public-utility as defined in section 201(e) of the Federal Power Act and its rates are subject to FERC jurisdiction under section 206 thereof. The rates allowed to NEPCO include, as a cost of service, its cost of fuel, which as allowed to NEPCO may include either the entire cost of transportation under the joint venture's charter to NEPCO, if FERC should determine that it is just and reasonable, or some other amount.

> Our grant of the exemption does not affect FERC's authority over rates; and the bilateral arrangement under the charter following upon the exemption does not prescribe what should be allowed to NEPCO in revenues from its wholesale power customers for transportation costs, either in allowed rates or under the fuel adjustment clause. These adjusting effects provide us sufficient assurance to determine that the exemption from cost remains consistent with the policy of section 13(b). In relying on this ratemaking process we do not cede any of our statutory responsibilities to another agency.[20]

We believe that the SEC's analysis that its determination pursuant to section 13(b) of PUHCA does not affect our authority to make rate determinations is in accord with the presiding judge's conclusion that the SEC's regulation pursuant to section 13(b) of PUHCA does not preclude this Commission from determining the reasonableness of Ohio Power's coal costs during the ratemaking process. We shall affirm the judge's determination on this issue.

2. Section 35.14(a)(7) of the Commission's Regulations

Ohio Power contends that section 35.14(a)(7) of our regulations[21] precludes this Commission from looking at the price of the Martinka coal because that coal is subject to SEC and Ohio PUC regulation. Section 35.14(a)(7) provides in part that "where a utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause." Ohio Power argues

---

[20] 24 SEC Docket at 307-08.

[21] 18 C.F.R. § 35.14(a)(7) (1986).

that we cannot change the regulation without notice to those affected.[22]

The judge concluded that section 35.14(a)(7) creates a rebuttable presumption of reasonableness.[23] We agree. As the judge noted, in 1975, six months after promulgation of section 35.14(a)(7), the Chairman of the Federal Power Commission submitted a letter to the Senate Subcommittee on Reports, Accounting and Management, stating that section 35.14(a)(7) creates a presumption of reasonableness, not a conclusive finding of reasonableness. There is thus no retroactive change of a regulation involved in this case.[24]

B. Determining the Reasonableness of Ohio Power's Affiliate Fuel Purchases

Prior to Opinion No. 133 the reasonableness of affiliate coal purchases were determined on a cost-of-service basis. Under the Commission's regulation at section 35.14(a)(7),

---

[22] Ohio Power brief on exceptions at 57.

[23] 25 FERC at p. 65,184.

[24] ABP, and its affiliates, had actual notice of the Commission's belief that section 35.14(a)(7) of its regulations does not preclude a comparable market-price investigation into its affiliate coal purchases. The same issue was involved in *McDowell County*. Eight months after promulgation of section 35.14(a)(7), the Commission instituted an investigation of AEP's coal purchasing practices, including its purchases from affiliate coal companies which were subject to SEC regulation. 54 FPC 361 (1975). The Commission ordered that the investigation "include all coal contracts whether or not required to be submitted pursuant to Commission Order No. 517, 52 FPC 1304," the order promulgating section 35.14(a)(7). The Commission later ordered hearings on the coal cost issue pursuant to sections 205 and 206 of the Federal Power Act. 15 FERC ¶ 61,257, at p. 61,592-93 (1981).

Moreover, the SEC had made its determination before this proceeding was set for hearing at this Commission. Had the Commission considered the SEC determination to be conclusive, as Ohio Power contends, the issue of Ohio Power's coal costs would not have been set for hearing.

affiliate coal purchases which were subject to the regulation of another agency were deemed to be reasonable. If the affiliate transactions were not subject to the regulation of another agency, the utility was required to justify the reasonableness of the cost of the affiliate coal.

In Opinion No. 133, the Commission tested the reasonablenes of prices of affiliate coal purchases by comparing them to prices available from non-affiliated suppliers in a competitive market. The Commission found that "the interests of consumers will best be protected by permitting utilities that purchase coal from affiliates to recover no more from their ratepayers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier." [25]

Although the Federal Power Act does not mandate a market-price test to determine the reasonableness of affiliate transactions, there is no legal impediment to the use of such a test,[26] and there are a number of reasons arguing for its use. The Commission noted in Opinion No. 133 that companies that are subject to the competitive market are more efficient and innovative than those assured of a recovery of costs and a reasonable return, and that a market-price limitation on fuel expense recovery from affiliated suppliers provides the best incentive for utilities to develop the least costly sources of fuel.[27] In addition to the economic efficiency prompted by a market-price test, it provides protection from the prospect of self-dealing that arises in transactions between affiliates. What the Commission noted in stating the purpose of the comparable market-price test required by the Natural

---

[25] 17 FERC at p. 61,246.

[26] It is noteworthy that the Natural Gas Policy Act, 15 U.S.C. §§ 3311-3432 (1982) establishes the comparable market price as the ceiling for a just and reasonable amount a pipeline may pay an affiliated producer for gas. *See* section 601(b)(1)(E), 15 U.S.C. § 3431(b)(1)(E) (1982).

[27] 17 FERC at p. 61,246.

Gas Policy Act, for transactions between pipeline affiliates, is equally applicable to purchases from affiliates by electric utilities: "At the heart of section 601(b)(1)(E) is the simple notion that a pipeline may not grant a price preference to its affiliate." [28] In a *New Mexico* proceeding subsequent to Opinion No. 133, the Commission characterized the comparable market-price test as "an objective test" that prevents rate manipulation.[29] It provides a substitute for the arms-length negotiations that provide objectivity and fair dealing in non-affiliate transactions.

The Commission has not deviated from its continued support for a market-price test. As recently as 1985 the Commission reaffirmed its departure from a cost-based test of reasonableness for affiliate transactions. The enunciation of the market-price test in Opinion No. 133 was given by the Commission as its reason for terminating a 1979 rulemaking that had proposed to amend section 35.14(a)(7) to delete the provision deeming reasonable coal costs that were subject to the jurisdiction of another regulatory agency and to require that utilities file affiliate coal contracts regardless of jurisdiction by another agency.[30] The Commission, noting that the amendment to its regulations was proposed to effect the cost-based policy in effect when the proposal was issued, found that the filing of contracts was no longer necessary because of the departure from that policy and the adoption of a market-price test.[31]

---

[28] *El Paso Natural Gas Company*, 23 FERC ¶ 61,216, at p. 61,449 (1983).

[29] Opinion No. 164, 23 FERC ¶ 61,218, at p. 61,457 (1983).

[30] Termination of Rulemaking Dockets, 50 Fed. Reg. 24,779 (June 13, 1985), *FERC Statutes and Regulations, Proposed Regulations 1977-1981* ¶ 32,409, at p. 33,169; Revision of Fuel Cost Adjustment Clause Regulations Relating to Fuel Purchases from Company-Owned or Company-Controlled Sources, 44 Fed. Reg. 28,683 (May 16, 1979), *FERC Statutes and Regulations, Proposed Regulations 1977-81* ¶ 32,022.

[31] *FERC Statutes and Regulations, Proposed Regulations 1977-1981* ¶ 32,409, at p. 33,169.

Under a market-price test, the question in this proceeding is whether the price at which Ohio Power purchased Martinka coal from its affiliate is reasonable when compared with prices in the market for alternative supplies.

1. Establishing Comparable Market Prices

To establish a benchmark market price, staff identified other coal-fired electric generating plants within 50-, 75- and 100-mile radiuses of the Mitchell plant that use coal with sulfur content and Btu heat content comparable to that used at Mitchell,[32] and calculated the weighted average prices of contract coal delivered to those plants. The prices were taken from FERC Form 423 and were increased by 3.1%.[33]

The prices compared are the delivered prices, thus including the costs of transportation. Staff's study shows that there are no significant differences between the weighted average cost of comparable coal delivered within 50 miles of Mitchell and the cost of such coal delivered within the 75- and 100-mile radiuses. Staff ultimately relied, therefore, on prices within the 50-mile radius to establish the comparable market price. Within that radius, there were 13 plants which burned coal with a sulfur content of 1-4%, the range of sulfur content in

---

[32] *See, e.g.*, Ex. 13, Ex. 15 at 13-22, Tr. at 992-93. There is a high concentration of coal-fired electric plants in the vicinity of the Mitchell plant.

[33] Form 423 was designed to collect data on the cost and quality of fuel used for generating electricity. Among other things, the data facilitates comparison of the costs of captive and non-captive coal. *See* Change in Public Availability of FPC Form 423—Data on Cost and Quality of Fuels for Electric Plants, Docket No. RM77-2, 44 Fed. Reg. 21,596 (April 10, 1979), 6 FERC ¶ 61,208, at p. 61,520 (1979). The increase of 3.1% from the prices reported in Form 423 is based on a one-month audit by the Energy Information Administration of the Department of Energy which found that reporting utilities had understated their costs by this percentage.

the coal burned at Mitchell (including Martinka coal and other coal).

The average prices of the coal at the 13 plants in staff's study and the prices Ohio Power paid for Martinka coal are as follows:

	*Comparable Coal (1-4% sulfur)**	*Martinka Coal*	*Percentage Difference*
1980	123.2MMBtu	184.9¢/MMBtu	50%
1981	138.4	268.7	94%
1982	155.4	206.8	33%

* Adjusted up by 3.1% from Form 423 data.

(a) Characteristics of Comparable Coal

A comparable market price is the price of coal that is suitable for use at the plant in question, even if it is not identical to the coal from the affiliated supplier. If a certain characteristic of coal renders it unsuitable for use at a particular plant, it may nevertheless be suitable for purposes of price comparison, if the characteristic in question does not affect prices in the marketplace.

Staff limited its analysis of coal contracts to those for coal with heat content and sulfur content similar to that of coal now burned at the Mitchell plant because these are the two characteristics of coal that most significantly affect prices in the marketplace.[34] Ohio Power has established that coal with a high ash-fusion temperature is essential to the efficient operation of Mitchell Unit No. 2.[35] Martinka coal has such a characteristic.[36] However, Ohio has not established that ash-fusion temperature of Martinka coal commands a premium in the marketplace over coal with lower ash-fusion temperatures. It is therefore irrelevant for purposes of establishing comparable prices that the precise ash-fusion temperature of the

[34] Ex. 13 at 12.

[35] 25 FERC at p. 63,060, Ex. 4 at 17.

[36] *Id.*

coal included in staff's set of comparable contracts is unknown. We note however, that staff's evidence indicates that coal burned at neighboring plants with dry bottom boilers, such as Mitchell's, which generally require coal of higher ash-fusion temperature, does not command a price premium over coals burned at neighboring plants with wet bottom boilers.[37]

On the other hand, the captive coal may have characteristics that increase its price in the marketplace, but are not required for the boiler. The Mitchell plant was designed to burn coal with more than 4% sulfur content, and meet the emission standards of the Environmental Protection Agency.[38] Martinka coal has a sulfur content of approximately 1.5%.[39] The record in this case is clear that Ohio Power switched to Martinka coal in Mitchell Unit No. 2 because of its higher ash-fusion temperature, not because of its lower sulfur content.[40] Some of Ohio Power's witnesses suggest that the low sulfur content of Martinka coal renders it more desirable for environmental reasons than the non-affiliate coals with higher sulfur content also burned at Mitchell.[41] However, there is no evidence that it is required. Ohio Power's use of low sulfur coal at Mitchell appears to be fortuitous.

As described above, staff developed its benchmark price based on coals with 1-4% sulfur content from 13 plants. Of the 13 plants, eight plants used coal with a range of 1-2% sulfur content, comparable to the 1.5% sulfur con-

---

[37] We also note that it is clear from the record that coal with ash-fusion temperatures that met Ohio Power's bid specifications was available at prices lower than Ohio Power paid for the Martinka coal. *See* Section II.B.1(e) of this Opinion.

[38] 25 FERC at p. 65,189, Ex. 3, at 10, Ex. 15 at 13.

[39] *See, e.g.*, 25 FERC at pp. 65,182, 65,189, Ex. 15kk at 12, Ex. 3 at 22, Ex. 15 at 6.

[40] *See, e.g.*, 25 FERC at p. 65,181, Ex. 4 at 17.

[41] *See, e.g.*, Ex. 4 at 15-21.

tent of Martinka coal.[42] If it were clear that there were no benefits from the use of low sulfur coal at the Mitchell plant, a proper sample would exclude coals with 1-2% sulfur content. It appears there are no appreciable benefits in terms of the efficiency of the boiler's operation. However, while the low sulfur coal is not required to meet environmental standards, there may be environmental benefits from its use. We find that the use of coals with 1-4% sulfur content is a reasonable compromise.

(b) Characteristics of Comparable Contracts

Ohio Power objects that the prices used by staff are derived from contracts that were executed at different times than the date of its contract with its affiliate mine. Furthermore, the contracts are of different lengths of time than the term of the contract with its affiliate. In Opinion No. 133, the Commission recognized that the long-term reliability of a contract with an affiliate, and the market conditions at the time a long-term contract is negotiated, are circumstances that might justify differences in the prices of coal that otherwise has comparable characteristics.[43] In a competitive market, prices fluctuate in response to supply and demand, and to changes in the purchasing power of the dollar. Therefore, spot prices today may not be comparable to the

[42] Staff calculated a comparable market price based on the coal from the eight plants which used the 1-2% sulfur coal. As can be seen, the coal at these plants was also less costly than Martinka coal:

	*Comparable Coal (1-2% sulfur)**	*Martinka Coal*	*Percentage Difference*
1980	141.0¢/MMBtu	184.9¢/MMBtu	31%
1981	152.9	268.7	76%
1982	176.0	206.8	18%

* Adjusted up by 3.1% from Form 423 data.

[43] 17 FERC at p. 61,246.

prices derived from a 35-year contract executed 10 years ago.[44] Long-term contracts executed in a soft market, i.e., when supply is greater than demand and prices are depressed, would likely yield lower prices than contracts entered during a period of tight supply and high demand, even though the coal involved is identical in price-affecting characteristics.

Ohio Power argues that the contracts in staff's study were inappropriate in terms of contract vintage. Ohio Power asserts that, to establish a market price, the Commission should look only at contracts entered into at the same time as its Martinka contract.[45] Seventy-five percent of the contracts in staff's study were entered into after the Martinka contract.[46] The 1970s were a period of almost continuous inflation. Contracts made later in the decade, after the Martinka contract, would likely reflect higher prices. Staff therefore argues that its use of later-vintaged contracts tended to produce average prices above the level that would be truly comparable to the Martinka contract.[47]

Ohio Power's witness, Mr. Renton, testified that the coal market was "soft" from late 1971 until early 1973.[48] Supply exceeded demand and prices were low. Ohio Power's contract for Martinka coal was dated October 1, 1972, in the midst of the soft market. The Arab oil embargo and sharp increases in the world price of crude oil in 1973 apparently caused a "tight" coal market, and prices moved higher.[49] Mr. Renton characterized the market as soft from late 1974 through early 1979, fol-

---

[44] Ohio Power's contract for Martinka coal was executed in 1972 for a term of 35 years.

[45] Ohio Power brief opposing exception at 53-54.

[46] 25 FERC at p. 65,197; Ex. 15 at 15, Ex. 15RR at 5.

[47] Staff brief on exceptions at 60 n.30.

[48] Tr. 639-41.

[49] Tr. 641.

lowed by a tight market for a brief period in 1979 through the first part of 1980.[50] This testimony does not indicate any circumstances in the coal market when the Martinka coal contract was made that would justify unusually high prices. Nor does it indicate that prices derived from later-vintaged contracts are likely to be lower than prices reflecting the 1972 market conditions.

Staff utilized a statistical analysis technique to attempt to discern a correlation between the prices paid under its set of comparable contracts and the vintages of those contracts. Its analysis failed to show any consistent, discernible correlation.[51] The judge ultimately concluded that vintages could affect the prices, and should be looked at carefully.[52] We agree. The parties have adequately considered the possible effects of vintage on the prices derived from staff's set of comparable contracts. The only conclusion we can draw is that staff's benchmark prices may be higher, i.e., skewed in favor of Ohio Power, than if only contracts of the Martinka vintage were used for comparison.

Ohio Power presented evidence of correlations between higher prices and larger quantities of coal delivered under a contract, and between higher prices and contracts of longer duration.[53] The reliability of the data used to show these correlations and the validity of the conclusions drawn were contested by staff. The judge declined to draw any conclusions from the welter of conflicting testimony on these contentions.[54] Staff points out that Ohio Power failed to quantify what adjustments to staff's benchmark prices would be warranted if Ohio Power's

---

[50] Tr. 642-43.

[51] 25 FERC at p. 65,187, Ex. 13G at 15.

[52] 25 FERC at p. 65,199.

[53] 25 FERC at p. 65,199, Ex. 9H at 9-15.

[54] 25 FERC at p. 65,199.

alleged correlations were accepted.[55] We are likewise unable to conclude on the basis of the record evidence that the asserted correlations exist, or if so, what adjustments to the benchmark prices they would warrant.

(c) Other Measures of Comparability

(i) Mine-mouth plants

Ohio Power argued that mine-mouth plants should be excluded from the set of contracts used by staff in developing the benchmark prices because the delivered prices of coal to such plants would not include any significant transportation costs, while the delivered prices to the Mitchell plant include such costs.[56] In order to test Ohio Power's claim, staff excluded mine-mouth plants burning 1-4% sulfur coal within 50 miles of Mitchell and found that the average price was slightly lower in 1980 (−2.7¢/MMBtu or 2.3% lower), and slightly higher in 1981 (+0.1¢ or 0.1% higher) and 1982 (+3.0¢ or 2.0% higher). Staff's analysis shows that the delivered prices of coal to mine-mouth plants are not significantly different from delivered prices to the other plants in the region.[57] Therefore, we find staff's inclusion of mine-mouth plants in its set of comparable contracts acceptable.

(ii) Transportation costs

Ohio Power questioned staff's reliance on delivered prices to plants other than Mitchell without considering the possible effects of differing costs of transportation. Ohio argued that the delivered price of some alternative coal supply might be higher (or lower), if delivered to the Mitchell plant rather than some other plant in the

---

[55] *See, e.g.*, Staff brief on exceptions at 61-62, n.30, 73-74.

[56] Ex. 9F, *see also* Ohio Power brief opposing exceptions at 49.

[57] *See, e.g.*, Ex. 136 at 17-18, Ex. 15QQ at 3.

region, if the transportation costs are different.[58] However, the marginal differences in the costs of transporting coal to any point within a 50-mile radius are likely to be small, and there is no reason to anticipate that the average of any such differing costs to other plants would be lower than the transportation costs of shipping coal to the Mitchell plant.[59]

(iii) Geographical area

Ohio Power argues that if staff's 100-mile radius were slightly extended it would then include three more plants whose coal prices would significantly increase the averages and that "a natural break in the chain of substitution" occurs just beyond the extended radius.[60] Staff points out that two of the plants Ohio Power wants to include in the sample burn coal with less than 1.0% sulfur and would thus be outside the range of comparable coal. The coal prices at the other plant are only slightly higher than the average of those within the 100-mile radius.[61]

Drawing a line at 50 miles or 100 miles obviously involves an element of discretion. If a 100-mile radius is reasonable, it is unlikely that a 105-mile radius would be unreasonable. But once the line has been drawn, and there are reasonable arguments to support where it is drawn, the burden is on a challenger to demonstrate convincingly that the line should be drawn elsewhere. Ohio Power's proposal to include one more plant using coal with comparable sulfur content does not carry that burden.

---

[58] Ohio Power brief opposing exceptions at 50.

[59] Differing transportation costs would have to be considered if benchmark prices were derived from only one or two comparable contracts.

[60] Ohio Power brief opposing exceptions at 48.

[61] Ex. 15QQ at 1-3.

We find that the presence of 13 plants within 50 miles that burn coal with price-affecting characteristics suitable for use at Mitchell provides an adequate sample of the relevant market by which to compare Martinka prices.

(iv) Price premium for affiliate supply

Ohio Power claimed that, in comparing affiliate coal prices with market prices, affiliate coal prices should be adjusted to reflect a price premium warranted by the security and reliability of an affiliate coal supply.[62] Ohio Power, however, makes no attempt at quantifying this price premium. In fact, the evidence indicates that, at least during the 1981 coal strike, the supply of Martinka coal was not as reliable as Ohio Power alleges it to be. We have considered the reliability premium argument raised by Ohio Power, but find that the company failed to meet its burden of demonstrating that such a premium is warranted.

(v) Mine type

Finally, Ohio Power argues that staff's inclusion of stripmine coal in its sample tends to produce a lower average price than if only coal from underground mines were considered. Ohio Power asserts that coal from underground mines is generally more expensive than otherwise comparable coal from strip mines.[63] However, staff's evidence shows that the strip-mine coal in its sample was more costly than the coal from underground mines.[64] Even if Ohio Power's assertion is generally true, there is nothing in the record to justify paying a premium for coal from an underground mine if suitable coal is available at less cost from a strip mine.

---

[62] Ohio Power brief opposing exceptions at 60-62.

[63] Ohio Power brief opposing exceptions at 61.

[64] Ex. 15QQ at 3-5, Ex. 15RR at 6-7.

(d) Average Price versus Range of Prices

Ohio Power argues that when a set of contracts are identified as comparable, the prices under these contracts should be viewed as establishing a range of reasonable prices. If prices under the affiliate contract fall within the range, they should be deemed reasonable. If they are above the highest prices in the range, refunds should be required to bring the affiliate contract prices down to the highest prices in the range, but no lower.[65] The effect of Ohio Power's approach would be to make the contract with the highest prices the benchmark, and to disregard prices under the other contracts. However, we cannot ignore the other contracts in the group unless the similarities between the affiliate contract and the contract with the highest prices are so striking, and the dissimiliarities of the other contracts in the group so significant that the highest-paid contract should clearly serve as the benchmark. Ohio Power did not argue that its Martinka contract was strikingly similar to the highest priced comparable contract.

Moreover, the use of a weighted average price is a convention frequently employed to establish a reasonable midpoint.[66] It is more appropriate than relying on the highest-priced coal under any reasonably comparable contract to set the market standard and effectively ignoring all other lower prices under other reasonably comparable contracts.

(e) Ohio Power's Market Price Evidence

Ohio Power submitted evidence of its bid solicitations in 1980 and 1981 for Martinka-quality coal and the responses from independent coal suppliers.[67] Current bids are not likely to reflect the same factors affecting prices

---

[65] Ohio Power brief opposing exceptions at 4, 13-17.

[66] *See Tennessee Gas Pipeline Co.*, 38 FERC ¶ 61,306 (1987).

[67] Ex. 15DD.

under the contract for Martinka coal, signed 10 years earlier, and original bids are likely to be higher than finally negotiated contracts. Nevertheless, we agree with the judge that evidence of current bids is relevant to discerning current market prices.

Staff notes that the average delivered price of the six lowest bidders in 1980 was roughly $1.42/MMBtu.[68] This compares to the $1.41 adjusted benchmark price that staff derived from its set of comparable transactions (for 1-2% sulfur content coal) while Ohio Power paid $1.85/MMBtu for Martinka Coal.[69] The 1981 solicitation identified seven suppliers who bid to supply low sulfur coal (comparable to Martinka), with ash-fusion temperatures and other characteristics that met Ohio Power's bid specifications, at an average delivered price of roughly $1.54 per MMBtu.[70] This compares to staff's conclusion that the comparable market price for low sulfur coal (1-2%) that year was $1.53, while Ohio Power paid $2.69 for Martinka coal.[71] Thus, Ohio Power's bid evidence can be viewed as supporting staff's position on comparable market prices.

The judge said that the 1980 and 1981 bid solicitations lead to the conclusion that Martinka-quality coal could have been obtained at a cheaper price than was paid by Ohio Power.[72] However, he found this conclusion to

---

[68] Staff brief on exceptions at 42.

[69] *See* n.42, *supra*.

[70] Staff brief on exceptions at 43, Ex. 15LL at Sch. 6.

[71] *See* n.42, *supra*. The judge noted that the Martinka mine was closed during part of 1981 because of a strike and other operating difficulties. 25 FERC at p. 65,182. Because Ohio Power's contract obligates it to pay the Martinka mine's fixed costs regardless of the amount of production, Tr. 734, the unit cost of Martinka's coal was abnormally high in 1981. Therefore, the bid prices averaging $1.54 might be more properly compared to the $2.07 paid for Martinka coal in 1982.

[72] 25 FERC at p. 61,195.

be tempered by the fact that the market may have been soft in those years.[73] The average price of 22 offers made in 1980 ($1.58/MMBtu) compares to staff's adjusted weighted average price of $1.41/MMBtu for low-sulfur coal used within a 50-mile radius. In 1981, Ohio Power's average of 20 offers ($1.76/MMBtu) compares to staff's comparable benchmark price of $1.53/MMBtu. However, the judge's ultimate conclusion that Martinka prices "are not too bad" was based on his comparisons of the $40 per ton (converted from cents per MMBtu) average of the 1980 bids to the $44.10 per ton paid for Martinka coal and the $45 per ton average of the 1981 bids to the $48 per ton paid for Martinka coal in 1982 (substituting 1982 Martinka prices for 1981 prices to avoid the distortions caused by the strike).[74]

We think the prices from the lower bids are more indicative of market prices. Bids are indicative of market prices to the extent they are likely to be accepted and form the prices for transactions. Actual transactions are more likely to develop from among the range of lowest bids. Consequently, we believe staff's average of the lower bids is more indicative of current market prices than the average of all bids used by the judge as the basis for his conclusions.

Ohio Power also identified four coal seams owned by independent coal suppliers, within a 75-mile radius of the Mitchell plant, that could provide Martinka-quality coal.[75] Ohio Power compared the weighted average prices of coal from this sample of mines to show that Martinka coal was $6.89 per ton more expensive in 1980, and $17.82 more expensive in 1981 (the abnormal year), but $6.08 per ton less expensive in 1982.[76]

Ohio Power's study was offered to show the reasonableness of the cost of Martinka coal but not to serve as the

---

[73] *Id.*

[74] *Id.*

[75] Exhibit 4 at 33-39.

basis for repricing the coal.[77] However, even if it had been offered for the purpose of establishing a comparative market price, we would not find it adequate. There is substantial evidence that the relevant geographic market based on the location of mines rather than proximate coal-fired plants would approximate the geographic boundary of the Department of the Interior Bureau of Mines Districts Nos. 1-8, a much larger area than a 75-mile radius. The coal burned in other plants near Mitchell comes from those districts.[78] Ohio Power's bid solicitations went to companies with mines in those districts.[79] Ohio Power argues that coal from beyond 75 miles is usually not competitively priced because of the transportation costs. However, several suppliers from well beyond 75 miles (and within District Nos. 1-8) were among the bidders with the lowest delivered prices.[80] Ohio Power's study focused on prices of relatively small quantities of coal, and there are several other aspects of the study, as the judge noted,[81] that preclude us from according it weight as an indicator of comparable market prices.

2. Burden of Proof

Under section 205(e) of the Federal Power Act and § 35.13(e)(3) of the Commission's regulations,[82] the utility bears the ultimate burden of proving that its rates are just and reasonable. Application of the burden of proof is described in *Minnesota Power & Light Co.*

---

[76] Exhibit 4K.

[77] Ex. 4 at 37.

[78] Ex. 15 at 15, 15BB, Ex. 15CC.

[79] Ex. 13 at 15.

[80] Ex. 15LL at Sch. 6.

[81] 25 FERC at p. 65,203.

[82] 16 U.S.C. § 824d(e) (1982); 18 C.F.R. § 35.13(e)(3) (1986).

> [U]tilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.[83]

The judge in this proceeding found that staff's evidence created a serious doubt as to whether the price paid for Martinka coal was prudent. He stated that Ohio Power "convincingly erased that doubt but did this primarily by attacking the staff's presentation rather than by an affirmative showing of prudence." [84] The judge then found that Ohio Power had satisfied "whatever legal requirement is involved in meeting its burden." [85] We disagree. Ohio Power did not dispel the doubts raised by the staff's evidence and did not prove affirmatively that its fuel costs were reasonable.

Staff has shown that Ohio Power paid in excess of the market price for the Martinka coal, and Ohio Power did not rebut this showing. Moreover, Ohio Power failed to come forward with evidence that its affiliate coal costs were reasonable in comparison to market prices. As described above, all Ohio Power sought to do was cast doubt on different elements of staff's case. Ohio Power never attempted to show what the market price of coal was and therefore failed to show affirmatively that the prices it paid for the Martinka coal were reasonable. Ohio Power also failed to show that staff's evidence did not establish a market price with which to compare the cost of Martinka coal. We therefore shall reverse the

---

[83] 11 FERC ¶ 61,312, at p. 61,645 (1980). *See also, Anaheim v. F.E.R.C.*, 669 F.2d 799, 809 (D.C. Cir., 1981).

[84] 25 FERC at p. 65,202.

[85] *Id.*

judge's conclusion that Ohio Power met its burden of establishing that its costs were reasonable.

3. Conclusion

Our review of the record leads us to conclude that staff's market study, identifying plants within 50 miles of Mitchell that burn coal of comparable Btu content to that of Martinka coal and with suitable sulfur content (within a one to four percent range), provides a reliable calculation of comparable market prices by which to judge the reasonableness of Ohio Power's Martinka coal costs. The comparison [86] demonstrates that Ohio Power's costs of Martinka coal were 50% above market in 1980, 94% in 1981, and 33% in 1982. We have already considered proposed adjustments to the prices of comparable transactions to account for differences between the Martinka coal and that of comparable or suitable coal. We have considered differences in vintage, quantity, and duration of the contracts, and all other factors that the parties have suggested may justify higher prices for Martinka coal. Ohio Power has not justified disparities of the magnitude noted above.[87]

---

[86] *See* chart in section II.B.1. of this Opinion.

[87] We note that Ohio Power's Martinka coal costs have continued to exceed significantly the market price derived from the plants included in staff's study. According to data from FERC Form 423, Martinka's prices have exceeded market by 24.2% to 33.4% in the years 1983 through September 1986. The comparisons are charted below:

	*Comparable Coal (1-4% sulfur)**	*Martinka Coal*	*Percentage Difference*
1983	157.0¢/MMBtu	195.1¢ MMBtu	24.3%
1984	153.4	199.5	30.1
1985	153.9	191.1	24.2
1986**	149.1	198.9	33.4

* Adjusted by 3.1% for comparison purposes with staff's 1980-82 figures. We have no evidence that the underreporting noted in EIA's one-month audit, and on which staff relied in its calculations, continues to occur.

** Through September.

Ohio power suggests that there are many reasons for it to enter into affiliate coal contracts. Among these reasons are the effect of having affiliate coal mines on Ohio Power's ability to negotiate favorable coal contracts with independent coal suppliers. Ohio Power argues that the effectiveness of its coal purchases program is shown by the fact that its electric rates are low in comparison to neighboring utilities' rates. The relative level of Ohio Power's rates, however, is not evidence that its affiliate coal purchases are reasonable. There are a variety of reasons, totally unrelated to coal costs, that a neighboring utility might have differing rates. We therefore are left with a comparison of the Martinka coal prices with market price.

In view of the significance of the deviation between Ohio Power costs for Martinka coal and comparable market prices, we cannot conclude that Ohio Power's purchases of Martinka coal for its Mitchell plant are reasonable costs for its ratepayers to bear. Ohio Power has not submitted evidence which indicates otherwise. We therefore find that Ohio's rates based on those costs are not just and reasonable.

C. Establishing a Just and Reasonable Fuel Charge

Having determined that Ohio Power's rates are not just and reasonable, the Commission must establish a fuel charge that will result in a just and reasonable rate. This proceeding is distinguishable in this respect from the proceeding in Opinion No. 133. In that case, the Commission affirmed the judge's finding that the price of affiliate coal was reasonable under the market-price test, and it was, therefore, unnecessary for the Commission to establish an allowable price.

In this instance, the Commission believes it is reasonable to use a market price as the benchmark for Ohio Power's future fuel charges for Martinka coal and from which to calculate refunds for overcollections. For the same reasons that a market-price test is approved for

determining the reasonableness of the company's proposed charges, it is appropriate to use the market-price to calculate the just and reasonable rate when the company's charges are found unreasonable, particularly in this case where the parameters for determining a comparable market price have been adequately developed in the market price analysis presented by staff.

Ohio Power posed arguments on and opposing exceptions to the initial decision regarding the adverse effects that would result if this Commission reprices its coal at a market price. For instance, Ohio Power argues that if this Commission reprices its fuel according to market price, while the SEC applies a cost-of-service requirement, it will be "whipsawed" by the two commissions.[88] Ohio Power argues that its investment in the Martinka coal mine should not be judged by focusing on a short-term comparison with prices from alternative non-affiliated suppliers. Even if its prices during the early years of the mine's production may be above the market, that relation may not continue. Ohio Power argues that the payments for Martinka coal, based on costs, may be eventually less than the comparable market prices.[89] Ohio Power states that what may look like a "bad deal" in the short run may prove to be a "good deal" in the long run. However, Ohio Power argues if its charges to its wholesale ratepayers are limited to the market price during the early years of the contract, it will lose money on the transactions if, in the later years when market prices may exceed the cost of producing the captive coal, the SEC limits the affiliate transfer price to costs. There-

---

[88] *See, e.g.*, Ohio Power brief on exceptions at 35, 62.

[89] The costs which Ohio Power seeks to recover are the equivalent of rate-based regulated costs. Prices under rate-base regulation may be high during the early years of the inclusion of new plant in rate base. As depreciation expense is recovered, the rate base dwindles and the return on the diminished rate base likewise dwindles (if the rate of return is constant). This phenomenon is called the "front-end load effect" of rate-base pricing.

fore, Ohio Power suggests that it would have no opportunity to recoup the losses it may have incurred in the early years.[90]

Ohio Power argues that the practical effect of having this Commission regulate the transaction with Ohio Power's ratepayers by one standard, while the SEC regulates the transaction with its affiliate by another standard is to limit it to recovery under the lower of the two standards.[91] Ohio argues that this amounts to a partial confiscation of its investment in Martinka, and is unfair and perhaps unconstitutional.[92] It is also detrimental to public policy, Ohio Power argues, because utilities faced with the SEC/FERC "whipsaw" will forego the advantages of captive coal mines.[93]

Ohio Power's argument is misplaced. As noted above, we agree with the presiding judge's conclusion that this Commission regulates rates while the SEC regulates the intra-corporate price of coal and that section 318 of the Federal Power Act does not preclude the Commission from determining the just and reasonable charge for Ohio Power to recover from its wholesale customers for its purchases from the Martinka mine.[94]

The amount that the SEC allows as the transfer price of coal between Ohio Power and the Southern Ohio Coal Company does not dictate the amount that Ohio Power may recover in rates to its customers for fuel costs. This Opinion orders the company to charge ratepayers, at most, the comparable market price for Martinka coal. Although the SEC may limit the affiliate transfer price

---

[90] Ohio Power brief on exceptions at 25, 63, 65.

[91] *See, e.g.*, Ohio Power brief on exceptions at 17, 52.

[92] Ohio Power brief on exceptions at 25, 33, 56. Ohio Power brief opposing exceptions at 70.

[93] Ohio Power brief on exceptions at 63.

[94] 25 FERC at p. 65,183.

to costs even when market prices are higher than costs,[95] for electric rate purposes Ohio Power will have the option to charge its wholesale customers up to the market price for that affiliate coal. Consequently, Ohio Power is not, at it alleges, required to limit its rate recovery of Martinka coal costs to the lower of the two standards.

Allowing Ohio Power to collect the market price, even when the market price exceeds costs, is consistent with our holding in Opinion No. 133 where we stated that "the interests of the consumers will best be protected by permitting utilities that purchase coal from affiliates to recover no more from their ratepayers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier." [96] When market prices are lower than costs, tying fuel charges to the comparable market price assures that ratepayers will pay for affiliate coal no more than they would have paid for non-affiliate coal. On the other hand, when the market price exceeds costs, ratepayers will still be paying no more than what they would pay for non-affiliate coal, and will not be harmed by the affiliate relationship.

Establishing the comparable market price as the allowable fuel charge for affiliate coal supplies in this case will provide an incentive to Ohio Power to ensure that its subsidiary coal company is as innovative and operates as efficiently as possible.[97] The lower the affiliated company's costs, the higher Ohio Power's potential return on investment.

By allowing the collection of the comparable market price, regardless of whether the price is higher or lower than costs, Ohio Power will not be limited to collecting market price only when costs may be higher, which would preclude it from recouping high start-up costs as the

---

[95] *But see* n.17, *supra*.

[96] 17 FERC at p. 61,246.

[97] *Id.*

costs of mining drop relative to market price. Establishing the reasonable cost of the affiliate coal supply by a comparison with the competitive market allows Ohio Power the same chance to earn a return on investment in its affiliate coal mine as an independent supplier of coal. It is Commission policy that a regulated company should not receive less revenue for its sales due solely to the mere affiliation between supplier and purchaser.[98] Whether or not Ohio Power's commitment to Martinka coal proves to be "a good deal" over the long run will depend on Ohio Power's ability to recover its investment in the mine, plus a reasonable return, without charging its ratepayers for fuel costs in excess of comparable market prices. However, this consideration is irrelevant when a comparable market price is established as a just and reasonable rate. Under the rational of tying affiliate coal costs to the comparable market price, not only must cost recovery be limited to the market price when actual costs exceed market price, but fuel charges must be allowed up to the market price, even if actual costs are less. Therefore, if, as Ohio Power argues in this case, its investment in the Martinka coal mine will prove to be a good deal in the long run, it will benefit by recouping losses that result from the refunds of excessive fuel costs required by this Opinion and order.

D. Calculation of Coal Cost Recovery and Refund

The benchmark price mechanism approved and ordered in this Opinion will establish, for Ohio Power's Martinka coal, the market price, which will be the just and reasonable fuel adjustment charge under the Federal Power Act. The Commission will change the benchmark price mechanism only prospectively, if it can be shown that it no longer serves as a valid tool for determining comparable market prices. As ordered below, Ohio Power must

---

[98] *Columbia Gulf Transmission Company*, Opinion No. 47, 8 FERC 61,002 (1979), *reh'g denied*, 9 FERC 61,355 (1979).

calculate refunds and future fuel adjustment clause collections based on the benchmark price mechanism approved in this Opinion. The benchmark price will be based on data from FERC Form 423 and will be derived from the weighted average delivered price of contract coal to plants within 50 miles of the Mitchell plant and having a sulfur content of 1-4% and a Btu content of not less than 11,500 Btus per pound.[99]

Refunds for excessive coal costs collected through the fuel adjustment clause prior to the filed rates in this proceeding are not mandatory. Staff recommends refunds only from the dates that Ohio Power's proposed rates in this proceeding became effective subject to refund—July 29, 1982 for the Wheeling Electric Company, and December 28, 1982 for the municipals.[100]

The municipals, on the other hand, seek refunds for all of 1980, 1981 and 1982, in addition to excesive fuel costs collected since December 28, 1982. The municipals point out that we have authority to require refunds of any costs previously collected under a fuel adjustment clause, if such costs are found to be imprudent, unjust or unreasonable, regardless of whether such costs were recovered through rates collected subject to refund.[101]

We must determine whether, and if so to what extent, refunds of historical coal costs are warranted in light of the interests of the customer and the utility.[102] For the

---

[99] The Mitchell plant's boilers require coal of not less than 11,500 Btus per pound. Ex. 15 at 13, Ex. 3 at 36.

[100] The suspension order in these proceedings established these dates. 20 FERC ¶ 61,081 (1982).

[101] *Public Service Company of New Hampshire*, Opinion No. 37, 6 FERC ¶ 61,299 (1979); *Electric Cooperatives of Kansas*, 14 FERC ¶ 61,176 (1981); *Carolina Power & Light Company*, 17 FERC ¶ 61,118 (1981); and *Delmarva Power and Light Company*, 24 FERC ¶ 61,199, at p. 61,461 (1983).

[102] *Second Taxing District of the City of Norwalk v. F.E.R.C.*, 683 F.2d 477, 490 (D.C. Cir. 1982).

reasons stated below, we will require refunds for Ohio Power's collections of its Martinka coal costs only after the effective date of the rate increases under these proceedings.

The Commission did not adopt the comparable market-price test for the reasonableness of affiliated coal costs until the issuance of *Public Service Company of New Mexico*, Opinion No. 133, on November 9, 1981. Prior to that date Ohio Power would not necessarily have anticipated that fuel charges within the cost-based limits imposed by the SEC might not be acceptable under this Commission's regulation. No one challenged the reasonableness of these affiliate coal costs until the instant proceeding. As such, no refunds will be ordered for excessive costs collected prior to the effective date of superseding rates in this proceeding.

The Commission orders:

(A) The initial decision is affirmed and adopted to the extent it is not inconsistent with this Opinion and order. Exceptions to the initial decision not granted in this Opinion are denied.

(B) Ohio Power shall file revised rates in accordance with this Opinion and order, and refund the difference between amounts collected subject to refund and amounts payable under the revised rates. Refunds shall be made with interest, in accordance with 18 C.F.R. § 35.19(a) (1986).

(C) Ohio Power shall file, within 30 days of the date of issuance of this Opinion and order, an amendment to its fuel adjustment clause. This amendment shall specify the method, consistent with paragraph (D), for estimating monthly fuel charges for billing purposes (unless a lagged fuel adjustment is used) and any true-up procedures to adjust for actual data as it becomes available.

(D) Ohio Power shall calculate the comparable market prices for its purchases of Martinka coal for delivery to its Mitchell plant in accordance with the following

method and on the basis of data filed with the Commission on FERC Form 423, and may include up to the comparable market price of Martinka coal in calculating that portion of its monthly fuel charge related to fuel costs associated with generation from the Mitchell plant. The comparable market price shall be the weighted average delivered price of contract coal, having a sulfur content of 1-4% and a Btu content of not less than 11,500 Btus per pound, to plants within 50 miles of the Mitchell plant. To the extent Ohio Power calculates the comparable market price on the basis of estimates, for fuel clause purposes it shall adjust its fuel charge on the basis of the data filed with the Commission on FERC Form 423 within six months of calculating any comparable market price on the basis of estimates. Ohio Power must also revise its demand rates to reflect benchmark prices for Martinka coal used at its Mitchell plant in its Period II working capital estimates.

(E) Ohio Power shall make refunds in accordance with paragraph (B) and implement the procedures required by paragraphs (C) and (D) within 75 days of the date of issuance of this Opinion and order. However, if an application for rehearing is pending at the end of the 75-day period, the refunds shall be made, and the procedures implemented, within 30 days of the date such application is disposed of by the Commission.

(F) The May 15, 1986 motion of New England Power Company to file an *amicus curiae* brief in this proceeding is denied.

(G) Subdocket 000 of Docket Nos. ER82-553 and ER82-554 are hereby terminated. New subdockets will be assigned to Ohio Power's compliance filings required by this order.

APPENDIX F

FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

Docket Nos. ER82-553-002, ER82-553-003, ER82-554,002, and ER82-554-003

OHIO POWER COMPANY

Opinion No. 272-A; Opinion and Order Denying Requests for Rehearing, and Denying Request for Stay

(Issued April 7, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Opinion No. 272 on recovery of the cost of coal purchased from an affiliate issued April 30, 1987, appears at 39 FERC P61,098.]

[Opinion No. 272-A Text]

On April 30, 1987, the Commission issued Opinion No. 272 in this proceeding.[1] The Commission affirmed the presiding administrative law judge's conclusion in the initial decision[2] that the Commission is not precluded by either statute[3] or regulation[4] from determining whether

[1] *Ohio Power Company*, Opinion No. 272, 39 FERC P61,098 (1987).

[2] *Ohio Power Company*, 25 FERC P63,060 (1983).

[3] Section 318 of the Federal Power Act, 16 U.S.C. § 825q (1982).

[4] 18 C.F.R. § 35.41(a)(7) (1987).

it is just and reasonable for Ohio Power Company (Ohio Power) to recover the full costs of its purchase from the Martinka mine from its wholesale rate payers, and that Ohio Power's affiliate coal costs are subject to the comparable market price test, adopted in Public Service Company of New Mexico, Opinion No. 133,[5] to determine the reasonableness of those costs. The Commission, however, reversed the initial decision by concluding that the costs Ohio Power had recovered for its purchases of Martinka coal were unreasonable when compared with the market price for comparable coal. The Commission ordered Ohio Power to refund amounts collected, as of the effective dates of the rates in these proceedings, to the extent that they reflect a price exceeding the market price for comparable coal.

Ohio Power has filed a request for rehearing. The Utility argues that section 318 of the Federal Power Act and section 35.14(a)(7) of our regulations preclude the Commission from considering the reasonableness of Ohio Power's affiliate coal costs. Ohio Power also urges that the Commission's decision was not based on substantial evidence. Ohio Power believes the Commission should have analyzed its coal purchases using a prudence standard which, it contends, would have resulted in the Commission's approving the utility's affiliate coal costs. Ohio Power further contends: that the comparable market price test in this case is inconsistent with the standard used in Tennessee Gas Pipeline Co.;[6] that the Commission should look at Ohio Power's total coal procurement and utilization program; and that the record shows that Ohio Power's rates are relatively low. Therefore, the Commission should allegedly not be concerned with the reasonableness of Ohio Power's coal costs because it is

---

[5] 17 FERC P61,123 (1981), *reh'g denied*, 18 FERC P61,036 (1982), *aff'd, Public Service Company of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987).

[6] Opinion No. 269, 38 FERC P61,306 (1987).

the rate and not isolated expense components that must meet the "just and reasonable" test. Ohio Power urges that the Commission should have not ordered refunds because the Commission adopted a novel interpretation of its fuel adjustment clause regulation, extending the market price test of Opinion No. 133 to a utility with above market price coal costs, and because the Commission waited more than three years to reverse the judge's decision that Martinka coal costs were not unreasonable. Ohio Power requests that if the Commission denies rehearing, our refund order should be stayed pending judicial review. Finally, Ohio Power argues that our order has the effect of revising the company's demand rates. The company alleges this is impermissible since those rates were settled earlier in this proceeding.

On June 1, 1987, the Municipal Wholesale Electric Customers of Ohio Power (Municipals) filed a request for rehearing of Opinon No. 272. The Municipals claim that the Commission should have ordered refunds for the period 1980-1982 as well as from the effective date of the rates, December 28, 1982. In addition, they request that the Commission clarify whether refunds are to be based on a market price determined with a 3.1% upward adjustment.[7]

Discussion

The requests for rehearing raise no arguments which warrant changing our decision in these proceedings. We

---

[7] As indicated in Opinion No. 272, the 3.1% adjustment was made to compensate for a potential error in the historical data, for purposes of determining whether Martinka coal costs have been excessive. This adjustment was made out of an abundance of caution in assessing the reasonableness of Ohio Power's coal costs. However, in ordering refunds, we directed the utility to calculate refunds using actual data from FERC Form 423 without making any adjustment. 39 FERC at p. 61,289. No further clarification is necessary.

shall, however, address several points raised in the pleadings.

Ohio Power contends that we must conduct a "prudence" analysis in order to assess the reasonableness of its Martinka coal costs. The Commission has already determined in Opinion No. 133 that, as a matter of policy, affiliate coal purchases should be judged by a market price standard, 17 FERC at p. 61,246, and our decision has been affirmed on appeal. 832 F.2d at 1212-14. The utility's argument that we must conduct a "prudence" analysis in the circumstances of this case is without merit.

Ohio Power also argues that our market price test is inconsistent with that used by the Commission in *Tennessee Gas*. In *Tennessee Gas*, we held that in determining the reasonableness of natural gas prices paid to affiliate producers by pipelines, it was appropriate to compare the weighted average price of all affiliate natural gas with prices paid to nonaffiliates by the pipeline and third parties. In this case, we have focused solely on the price paid by Ohio Power for coal from the Martinka mine. The decision in *Tennessee Gas* is inapposite to this case. As Ohio Power admits in its request for rehearing, all pipeline natural gas is fungible, whereas all coal is not. In addition, the question of whether prices paid to affiliated coal suppliers should be averaged, where more than one affiliate relationship is questioned in a particular case, is not present in this proceeding. In any event, Ohio Power has not presented any evidence in support of a determination of market price under the test used in *Tennessee Gas*, and, thus, failed, even under that standard, to dispel the doubts raised by Staff's evidence as to the reasonableness of the price paid by it for coal from the Martinka mine.

Ohio Power's argument that we erred by revising its demand rates is also misplaced. In approving an earlier settlement in this proceeding, we stated that it would become effective December 28, 1982, not subject to refund

as to any issue except to the extent an adjustment is required as a result of the Commission's determination of the captive coal issue. 23 FERC P61,236 (1983). Because the value of Martinka coal as calculated under the market price test affects the amount of fuel stock and working cash included in rate base which, in turn, affects the level of Ohio Power's unit demand charge, our requirement that Ohio Power revise its demand charges is appropriate.

As to Ohio Power's request that we give prospective effect only to our decision, we have already rejected the contention that the application of a market price standard to the facts included in this case represent a change in Commission policy. Ohio Power argues that because it has continued its operation of the Martinka mine pending a final Commission decision, fairness requires that the decision be applied prospectively. The Municipals, on the other hand, request that we apply our decision to coal costs paid prior to the effective date of the rates filed in this proceeding. We carefully considered the interests of both the utility and its customers in Opinion No. 272 in determining that refunds should be ordered as of the date previously chosen, and we find no reason to alter our conclusion in light of the arguments made on rehearing.

Finally, Ohio Power requests that we stay the effect of our order pending judicial review. Section 705 of the Administrative Procedure Act [8] permits an administrative agency to stay its order if it finds that "justice so requires." The inquiry involves a balancing of the various interests involved, including an assessment of whether the party seeking a stay will suffer irreparable harm if the stay is denied. *Town of Highlands, N.C. v. Nantahala Power & Light Co.*, 41 FERC P61,288 (1987); *see also Middle South Energy, Inc.*, 32 FERC P61,207 (1985). In support of its request for stay, Ohio Power focuses on the matter of irreparable harm, alleging that

[8] 5 U.S.C. § 705 (1982).

if the Commission's decision is reversed, it will be difficult for the utility to recover the refunded coal costs from its customers.

We shall deny the request for a stay. In the event an appellate court reverses our decision, the Commission would be empowered to order Ohio Power to be made whole. The possibility that the utility might experience difficulty in recouping refunds from its wholesale customers does not constitute irreparable injury. *Nantahala Power & Light Co.*, 21 FERC P61,274 (1982).[9] Further, the utility has not shown that the customers will suffer little, if any, harm by delaying the payments of refunds. We believe that the public interests supports the rapid disbursement of refunds.

The Commission orders:

(A) The requests for rehearing of Opinion No. 272 filed by Ohio Power and the Municipals are hereby denied.

(B) The alternative request by Ohio Power for a stay of the Commission's order issued in Opinion No. 272 is hereby denied.

(C) Subdockets -002 and -003 of Docket Nos. ER82-553 and ER82-554 are hereby terminated.

---

[9] *See also Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

APPENDIX G

STATUTORY AND REGULATORY PROVISIONS

15 U.S.C. § 79m(b)

(b) **Contracts by subsidiary or mutual service companies.** After April 1, 1936, it shall be unlawful for any subsidiary company of any registered holding company or for any mutual service company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the Commission by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies. This provision shall not apply to such transactions as the Commission by rules and regulations or order may conditionally or unconditionally exempt as being necessary or appropriate in the public interest or for the protection of investors or consumers, if such transactions (1) are with any associate company which does not derive, directly or indirectly, any material part of its income from sources within the United States and which is not a public-utility company operating within the United States, or (2) involve special or unusual circumstances or are not in the ordinary course of business.

16 U.S.C. § 825q

§ 825q. Conflict of jurisdiction

If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any

security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 [15 USCS §§ 79 et seq.] or of a rule, regulation, or order thereunder and to a requirement of this Act [16 USCS §§ 791a et seq.] or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 [15 USCS §§ 79 et seq.] shall apply to such person, and such person shall not be subject to the requirement of this Act [16 USCS §§ 791a et seq.], or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935 [15 USCS §§ 79 et seq.], in which case the requirements of this Act [16 USCS §§ 791a et seq.] shall apply to such person.

18 C.F.R. § 35.14(a)(7) (1992)

(7) Where the cost of fuel includes fuel from company-owned or controlled [1] sources, that fact shall be noted and described as part of any filing. Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause. If the current price, however, is in litigation and is being collected subject to refund, the utility shall so advise the Commission and shall keep a separate account of such amounts paid which are subject to refund, and shall advise the Commission of the final disposition of such matter by the regulatory body having jurisdiction. With respect to the price of fuel purchases from company-owned or controlled sources pursuant to contracts which are not subject to regulatory authority, the utility company shall file such

---

[1] As defined in the Commission's Uniform System of Accounts 18 CFR part 101, Definitions 5B.

contracts and amendments thereto with the Commission for its acceptance at the time it files its fuel clause or modification thereof. Any subsequent amendment to such contracts shall likewise be filed with the Commission as a rate schedule change and may be subject to suspension under section 205 of the Federal Power Act. Fuel charges by affiliated companies which do not appear to be reasonable may result in the suspension of the fuel adjustment clause or cause an investigation thereof to be made by the Commission on its own motion under section 206 of the Federal Power Act.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45551